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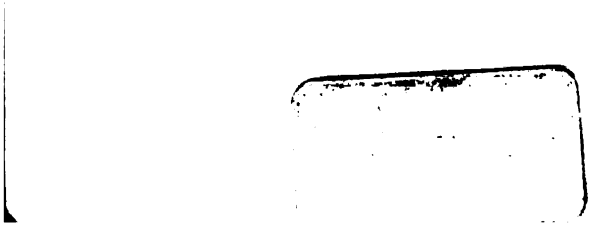

James T. Mitchell 1874

CASES

IN THE

CIRCUIT COURT

OF THE

UNITED STATES,

FOR THE THIRD CIRCUIT;

WITH

AN APPENDIX.

REPORTED BY

JOHN WILLIAM WALLACE.

PHILADELPHIA:

WALKER, 24 ARCH STREET.

1849.

Entered, according to act of Congress, in the year 1849, by A. Walker, in the clerk's office of the District Court of the United States, in and for the Eastern District of Pennsylvania.

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PREFACE.

When the present volume was undertaken at the request of the late Mr. Justice BALDWIN, and partly printed, near eight years since, it was supposed that in the course of a short time a sufficient number of cases would be decided, in different parts of the Circuit, to complete the book. But the illness of that Judge, his subsequent removal and residence in one of the most remote counties of the Circuit, and, after his death, a vacancy on the Bench for between two and three years, during which the Circuit was without a presiding Judge at all, disappointed these expectations. And when the present Judges took their places on the bench, the business of the Court had so largely departed from it, so much of what remained was fallen into decay, and, indeed, the Court itself had become so unfamiliar to the bar, that notwithstanding the well known character of the new Judges, and their readiness to attend to the business of the Circuit, it was impossible for some time, to bring any thing to a condition in which it could be either heard or disposed of. A jurisdiction entirely new would have had less to contend with in this respect than one thus fallen into desuetude. It is only now, indeed, that the confidence which the new Court so justly inspired, begins to shew itself in the increase of its business, and the revival of its ancient importance.

The Reporter refers to these things only in extenuation of the comparative want of interest which marks the present publication. Should his enterprise be continued, any future

volume will be found more worthy of approval, not only for the manner of reporting, but also for the importance of the decisions.

A report of the PEA PATCH CASE will be found in the Appendix. It is a case of value; and being a controversy to which the United States was a party, is not unsuitably placed in connexion with decisions of the Courts of the United States, to which, by the Constitution, such controversies belong. Indeed, it would have been tried and decided by the Court of this Circuit, had not the controversy, by putting in issue a question of boundary, involved also the right of any Circuit to try it. A special tribunal was indispensable; and the name of Mr. SERGEANT, by whose decision the controversy was finally settled, will not detract, it is supposed, from either the value or the interest of the case.

It is the Reporter's duty to add, that he has in several cases reported merely such points as he supposed novel or important; discarding, sometimes with no mention, other matters independent of them, and which in his judgment were well settled before, or were not worth reporting at any time. It is proper also to say that most of the opinions in Judge Baldwin's time, and some of the short ones since, are given in the language of the reporter; no opinions written out for publication having been delivered to him.

The late J. B. Wallace, Esq. published, about fifty years ago, a pamphlet containing a few cases decided in this Circuit as it was organized for about a year in the presidency of the elder Adams. The pamphlet has been re-printed since his death: and being cited as Wallace's Reports, the present work is distinguished as 'Wallace Junior.'

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RULES

AT LAW AND IN EQUITY OF THE

CIRCUIT AND DISTRICT COURTS

OF THE UNITED STATES,

FOR THE THIRD CIRCUIT,

EASTERN DISTRICT OF PENNSYLVANIA.

I.

ADMISSIONS FOR THE PURPOSE OF EVIDENCE.

1. In actions upon any instrument of writing, a copy of which shall have been filed within two weeks from the return day to which the action is brought, it shall not be necessary for the plaintiff, unless the defendant be an executor or administrator, to prove on the trial the execution thereof, nor in the case of bills of exchange or promissory notes, for an indorser to prove the signatures of prior endorsers, but the same shall be taken to be admitted, unless the defendant by affidavit filed at or before the time of filing his plea, shall have denied that such instrument of writing was executed by him, or that such endorsements were made.

2. In all actions by or against partners, it shall not be necessary for the plaintiff on the trial, to prove the partnership, but the same shall be taken to be admitted as alleged on the record, unless one or more of the defendants shall at or before the time of filing their plea, make and file an affidavit denying the existence of the partnership as alleged, and stating to the best of his or their knowledge and belief, whether there is any partnership in relation to the subject matter of the action, and if so, who are parties to it.

II.

AGREEMENTS OF COUNSEL.

All agreements of attorneys, touching the business of these courts shall be in writing, otherwise they will be considered of no validity.

III.

APPEALS AND WRITS OF ERROR.

1. Whenever an appeal to the Circuit Court has been made and perfected, from a final decree of the District Court, the appellant shall, within three days thereafter, file in the Circuit Court a certificate under the seal of the District Court: and upon such certificate being filed, the clerk of the Circuit Court shall enter the appeal upon the docket, and then receive and hold the moneys theretofore remaining in the District Court in the cause.

2. In case such certificate of appeal shall not have been filed the appellee may, at any time after the expiration of the said three days, receive from the clerk of the Circuit Court a certificate that no such appeal has been entered: and upon such certificate being filed in the District Court, the appeal shall be deemed abandoned, and the cause shall be thereby remitted for further proceedings in the District Court.

3. Appeals and writs of error shall be heard at the return term, and shall not be continued even by consent of counsel, but only for a legal reason assigned, or because the case is not reached. If when the case is reached, a legal reason be not assigned for putting it off, judgment of *non pros* shall be entered, with double costs, in case the plaintiff be the appellant or plaintiff in error, and in case the defendant be the appellant or plaintiff in error, judgment shall be entered against him for the same sum, or in the same way for which the District Court had rendered it with interest, double costs, and such damages for delay, as this court may deem just.

IV.

ATTORNEY AND COUNSEL.

1. No person shall be admitted to practice as counsel or attorney of these courts, unless he shall have previously been admitted in the Supreme Court of a State. Satisfaction of moral character will be required. He shall take the following oath, to wit: I do swear that I will demean myself as an attorney of this court uprightly and according to law, and that I will support the Constitution of the United States.

2. No attorney shall be accepted as security for costs, nor as bail of any kind, nor to testify in favour of his client, except as to matters which are proveable by the affidavit of a party.

V.

AUDITORS REPORTS.

No exception will be received to the report of any auditor, or to that of any master in chancery, unless the party excepting has filed the same with the auditor or master by whom the report has been made, whose duty it shall be, on such exception being filed, to re-consider the subject, and if deemed necessary by him to re-examine facts, and amend his report, if in his opinion such exceptions are in whole or in part well founded. And in order to give all parties in interest an opportunity of entering such exception, no auditor or master shall file his report until two weeks after he has notified to the parties or their counsel, his intention so to do on a day designated, and giving them an opportunity of having access to such report. And it is further ordered, that on the hearing of the question of confirming or setting aside any auditor's or master's report, the party excepting thereto shall be confined to the exception made by him before the auditor or master, according to the previous requisition of this rule; reserving to the court, however, the power of committing the report again, should justice require it.

VI.

BILL OF PARTICULARS.

After appearance, the defendant may call for a bill of particulars, and until it be furnished, proceedings shall stay. Should the plaintiff not furnish it for two calendar months, a non suit may be entered by the clerk, on notice of two weeks.

VII.

COSTS.

In every action in which the plaintiff or complainant is not at the time of suit brought a citizen of the District of Pennsylvania, or being so then afterwards removes from the District: and in every other case where a defendant, or other person for him, shall make affidavit that he believes the costs could not be recovered of the plaintiff by attachment or execution, a deposit or other security for costs shall be given, and proceedings shall be stayed until it is done.

VIII.

COMMISSIONS AND DEPOSITIONS.

1. A rule to take the depositions of ancient, infirm and going witnesses, to be read in evidence on the usual terms, is of course, and may be entered by either party, stipulating a reasonable notice to the adversary: so of a rule for a commission to any of the United States or to foreign parts. Testimony taken under a commission shall be by interrogatories and cross interrogatories.

2. Depositions may be taken before the Examiner, or any one of the commissioners of these courts: and commissions may be executed in the same way or by any person qualified to take testimony according to the laws of the State or county to which it issues. The interrogatories must be filed in the clerk's office at the time, and a copy thereof and written

notice of the rule and of the names of the commissioners, must be served on the adverse party or his attorney, at least two weeks before the commission issues, in order that he may file cross interrogatories or nominate commissioners on his own part, if he shall deem it eligible. To do which he shall have two weeks.

3. Exceptions to the interrogatories filed by either party must be taken before the commission is issued.

4. Notwithstanding a rule has been obtained for a commission, or for taking depositions of witnesses, and that they shall be read in evidence at the trial of the cause, in case of the death, absence, or other legal inability of such witness to attend; yet, in case the witness is resident within one hundred miles of the place of trial, it is ordered that the deposition shall not be read in evidence, unless the party offering it shall satisfy the court that a subpœna has been actually taken out, and that the witness has been duly subpœnaed or could not be found after reasonable pains taken for that purpose, or that the witness is physically unable to attend.

5. On the return and opening of any commission, or filing of any deposition, either party may give notice thereof to the opposite party, who shall within two weeks after service of such notice, file with the clerk a specification of his exceptions, if he have any, to the form or execution of the commission or taking of the deposition, or to the mode of swearing the witnesses, or to any of the acts or omissions of the commissioners, examiners or officers, or of any other person or persons, in or about the same. No exception to the admissibility of the evidence so returned or filed, not included in such specification, shall be taken on the trial of the cause, unless it be an exception that might be taken to the evidence, if the witness were offered for examination orally in court: *Provided*, that nothing herein be construed to permit or sanction the

3. On a plea of payment to a bond or specialty, the defendant, at least four weeks before the trial, shall give the plaintiff notice in writing of the matter intended to be objected in avoidance of the same, or else he shall be precluded therefrom.

4. When the defendant pleads a set-off, unless the matter be fully and specially set forth in the plea, or when he intends on the plea of payment to defalk his own account against the plaintiff's demand, or any part of it, he shall give a full and particular notice, in writing, of such intended set-off at least two weeks before the first day of the term for which the same is set down for trial, or he shall not be allowed to give in evidence, under such plea, any set-off, nor under such notice any matter of set-off not therein particularly set forth.

XIV.

RETURN DAYS.

Writs of process shall bear test the day they are issued, and may be made returnable to any return day. The first Monday of every month shall be a return day.

XV.

RULES.

Rules to declare and plead, and for all other pleadings may be entered from four weeks to four weeks in the clerk's office, and on failure to declare or plead or enter other pleadings accordingly, judgments nisi may be entered on motion either in court or before a judge at chambers.

[ADOPTED IN BOTH COURTS NOVEMBER 18, 1849.]

CASES IN THE THIRD CIRCUIT,

&c.

UNITED STATES VS. HOLMES.

(PUBLICATION DURING TRIAL.)

(HOMICIDE: SELF-DEFENCE.)

Although this Court is deprived, by the Act of 2nd March 1831, of the power to punish, as for a *contempt of Court*, the publication during trial, of testimony in a case; yet, having power to regulate the admission of persons, and the character of proceedings within its own Bar, the Court can exclude from within the Bar, any person coming there to report testimony during the trial.

Seamen have no right, even in cases of extreme peril to their own lives, to sacrifice the lives of passengers, for the sake of preserving their own. On the contrary; being common carriers, and so paid to protect and carry the passengers, the seamen, beyond the number necessary to navigate the boat, *in no circumstances*, can claim exemption from the common lot of the passengers.

In the case here reported, the relative obligations of seamen and passengers, in the event of ship-wreck or maritime disaster, are examined and stated.

The indictment charged, that the prisoner did commit manslaughter on the high seas, 1st, by casting F. A. from a vessel belonging &c. whose *name was unknown*: 2nd, by casting him from the *long-boat* of the ship W. B. belonging &c. The indictment is sufficiently certain.

April Sessions, 1842.

Statement.

The American ship William Brown, left Liverpool on the 13th of March 1841, bound for Philadelphia, in the U. S. She had on board, (besides a heavy cargo,) *seventeen of a crew*, and *sixty-five pas-*

April Sessions, 1842.

sengers; Scotch and Irish emigrants. About ten o'clock on the night of the 19th of April, when distant two hundred and fifty miles S. E. of Cape Race, New-found-land, the vessel struck an iceberg, and began to fill so rapidly that it was evident she must soon go down. The long-boat and jolly-boat were cleared away and lowered. *The Captain, the second mate, seven of the crew,* and ONE PASSENGER got into the *jolly-boat.* The first mate, eight seamen, of whom the prisoner was one, (these nine being THE ENTIRE REMAINDER OF THE CREW,) and *thirty-two passengers,* in all, forty-one persons, got indiscriminately into the *long-boat.** THE REMAINDER OF THE PASSENGERS, thirty-one persons, were obliged to remain on board the ship. In an hour and a half from the time when the ship struck, she went down, carrying with her every person who had not escaped to one or the other of the small boats.

Statement.

Thirty-one PASSENGERS thus perished.†

On the following morning, (Tuesday,) the Captain, being about to part company with the long-boat, gave its crew several directions, and, among other counsel, advised them *to obey all the orders of the mate, as they would obey his, the Captain's.* THIS THE CREW PROMISED THAT THEY WOULD DO.

The long-boat was believed to be in general good condition; but she had not been in the water since leaving Liverpool, now thirty-five days; and as soon as she was launched, began to leak. She con-

* The first mate and some of the crew of the long-boat were originally in the jolly-boat with the Captain; but the mate, understanding navigation, was transferred, with a chart, quadrant and compass, to the long-boat; and some of the crew were exchanged. The long-boat was 22½ feet long, six feet in the beam, and from 2½ to 3 feet deep.

† One passenger had died after leaving Liverpool, and before the catastrophe of the nineteenth.

tinued to leak the whole time; but the passengers had buckets and *tins*, and, by baling, were able to reduce the water, so as to make her hold her own. The plug was about an inch and a half in diameter. It came out more than once, and, finally, got lost; but its place was supplied by different expedients.

It appeared by the depositions of the Captain, and of the second mate,* (the latter of whom had followed the sea twenty-one years; the former being likewise, well-experienced,) that on Tuesday morning, when the two boats parted company, the long-boat and all aboard were in GREAT JEOPARDY. The gunwale was within from five to twelve inches of the water. "From the experience" which they had had, they thought "the long-boat was too unmanageable TO BE SAVED." If she had been what, in marine phrase, is called *a leaky boat*, she must have gone down. Even without a leak, she would not have supported one half her company, had there been "a moderate blow:" "she would have swamped very quickly:" The people were half naked, and were "all crowded up together, like sheep in a pen." "A very little irregularity in the stowage would have capsized the long-boat." "If she had struck any piece of ice, she would inevitably have gone down. There was great peril of ice for any boat."—*(Captain's and second mate's depositions.)* Without going into more detail, the evidence of both these officers went to shew, that loaded as the long-boat was on Tuesday morning, the chances of living

STATEMENT.

* The Captain and second mate, with the other persons in the jolly-boat, after having been out at sea six days, were picked up by a French fishing lugger. They afterwards came to Philadelphia, where, by consent of the United States, the depositions of the Captain and mate were taken, and the testimony was now read in evidence.

APRIL SESSIONS, 1842.

were much against her. But the Captain thought, that even if lightened to the extent to which she afterwards was, "it would have been impossible to row her to land; and that the chances of her being picked up, were ninety-nine to one against her."

It appeared, further, that on Monday night, when the passengers on the ship (then settling towards her head and clearly going down) were shrieking, and calling on the Captain to take them off on his boat, the mate, on the long-boat, said to them: "*Poor souls! you're only going down a short time before we do;*" and further, that on the following morning, before the boats parted company, the mate, in the long-boat, told the Captain, in the jolly-boat, that the long-boat was UNMANAGEABLE, and, that unless the

STATEMENT.

Captain would take some of the long-boat's passengers, IT WOULD BE NECESSARY TO CAST LOTS AND THROW SOME OVER-BOARD. "I know what you mean," or, as stated by one witness, "*I know what you'll have to do,*" said the Captain; "Don't speak of that now. Let it be the last resort."

There was little or no wind at this time; but pieces of ice were floating about.

Notwithstanding all this, the long-boat, loaded as she is above described to have been, did survive throughout the night of Monday, the day of Tuesday, and till ten o'clock of Tuesday night; full twenty-four hours after the ship struck the iceberg. The crew rowed, turn about, at intervals, and the passengers baled.

On Tuesday morning, after the long-boat and jolly-boat parted, it began to rain, and continued to rain throughout the day and night of Tuesday. At night

the wind began to freshen; the sea grew heavier; and once or oftener the waves splashed over the boat's bow so as to wet, all over, the passengers who were seated there. Pieces of ice were still floating around; and, during the day, icebergs had been seen. APRIL SESSIONS, 1842.

About ten o'clock of Tuesday night, the prisoner and the rest of the crew began to throw over some of the passengers, and did not cease until they had thrown over FOURTEEN MALE PASSENGERS. These, with the exception of two married men and a small boy, constituted all the male passengers aboard.

NOT ONE OF THE CREW WAS CAST OVER: one of them, the cook, was a negro.

It was among the facts of this case, that during these solemn and distressful hours, scarce a remark appeared to have been made in regard to what was going to be done, nor, while it was being done, as to the necessity for doing it. None of the crew of the long-boat were present at the trial, to testify; and, with the exception of one small boy, all the witnesses from the long-boat were women; mostly quite young. It is probable, that by Tuesday night, (the weather being cold, the persons on the boat partially naked, and the rain falling heavily,) the witnesses had become considerably overpowered by exhaustion and cold; having been twenty-four hours in the boat. None of them spoke in a manner entirely explicit and satisfactory in regard to the most important point, viz. the DEGREE AND IMMINENCE OF THE JEOPARDY at ten o'clock on Tuesday night, when the throwing-over began. STATEMENT.

As has been stated, few words were spoken. It appeared, only, that about ten o'clock of Tuesday night, it being then dark, the rain falling rather

APRIL SESSIONS, 1842.

heavily, the sea somewhat freshening, and the boat having considerable water in it; the mate, who had been baling for some time, gave it up, exclaiming: "THIS WORK WO'NT DO. HELP ME GOD! MEN, GO TO WORK." Some of the passengers cried out, about the same time: "*The boat is sinking. The plug's out.* GOD *have mercy on our poor souls!*"

Holmes and the crew did not proceed upon this order; and after a little while, the mate exclaimed again: "Men, you MUST go to work, or we shall all perish!" They then went to work; and, as has been already stated, threw out, before they ended, fourteen male passengers; and also two women.*

STATEMENT.

The mate directed the crew "not to part man and wife, and not to throw over any women." There was no other principle of selection. There was no evidence of combination among the crew. NO LOTS WERE CAST; nor had the passengers, at any time, been either informed or consulted as to what was now done.

Holmes was one of the persons who assisted in throwing the passengers over. The first man thrown over was one Riley, whom Holmes and the others told to stand up, which he did: they then threw him over; and afterwards, Duffy, who, in vain, besought them to spare him, for the sake of his wife and children, who were on shore. They then seized a third man; but, his wife being aboard, he was spared. Coming to Charles Conlin, the man ex-

* It was matter of doubt whether these women (two sisters of Frank Askin, an Irish youth, spoken of further on) had been *thrown* over; or whether their sacrifice was an act of self-devotion and affection to their brother. When Holmes seized him, his sisters entreated for his life, and said that if he was thrown over, they wished to be thrown over too; that "they wished to die the death of their brother." "Give me only a dress to put round me," said one of the sisters, after her brother had been thrown out, "and I care not now to live longer."

claimed: "Holmes, dear, sure you won't put *me* out?" "*Yes, Charley,*" said Holmes, "*you must go too;*" and so he was thrown over. Next was FRANCIS ASKIN, for the "manslaughter" of whom the prisoner was indicted. When laid hold of, he offered Holmes five sovereigns to spare his life till morning, "when," said he, "if GOD do'nt send us some help, WE'LL DRAW LOTS, AND IF THE LOT FALLS ON ME, I'LL GO OVER LIKE A MAN." Holmes said: I DO'NT WANT YOUR MONEY, FRANK;" and put him over-board. APRIL SESSIONS, 1842. STATEMENT.

When one M'Avoy was seized, he asked for *five minutes* to say his prayers; and at the interposition of a negro, the cook, *was alloved time to say them before he was cast over-board.* It appeared, also, that when Askin was put out, he had struggled violently: yet, the boat had not sunk.

Two men, very stiff with cold, who had hidden themselves, were thrown over after day-light on Wednesday morning, when, clearly, there was no necessity for it.*

*The exact condition of these two men, did not appear. Some of the witnesses thought that they were too much frozen to recover: others swore differently.

On Wednesday morning, *while yet in the boat,* some of the witnesses had told the crew, that they (i. e. the crew) should be made to die the death they had given to the others.

The boat had provisions for six or seven days, close allowance; that is to say, seventy-five pounds of bread, six gallons of water, eight or ten pounds of meat, and a small bag of oat-meal. The mate had a chart, quadrant and compass. The weather was cold, and the passengers, being half clothed, much benummed.

ON WEDNESDAY MORNING THE WEATHER CLEARED, AND EARLY IN THE MORNING THE LONG-BOAT WAS PICKED UP BY THE SHIP "CRESCENT." ALL THE

April Sessions, 1842.

PERSONS WHO HAD NOT BEEN THROWN OVER-BOARD, WERE THUS SAVED.

On the other hand the character of the prisoner stood forth, in many points, in manly and interesting relief. A Finn by birth, he had followed the sea from youth; and his frame and countenance would have made an artist's model for decision and strength. He had been the last man of the crew, to leave the sinking ship. His efforts to save the passengers, at the time the ship struck, had been conspicuous; and, but that they were in discharge of duty, would have been called self-forgetful and most generous.* As a sailor, his Captain and the second mate testified, that he had ever been obedient to orders, faithful to his duty, and efficient in the performance of it; "REMARKABLY so;"—said the second mate. "He was kind and obliging in every respect;"—said the Captain; "to the passengers, to his shipmates, and to every

Statement.

* On board the long-boat, a widowed mother—a Scotswoman—and her three daughters had escaped; but just as the boat was about veering astern, and when there was great danger of being drawn into the vortex of the sinking ship, it was discovered, that one of the family, a sick sister, had been left behind in the ship. Her mother was calling: "Isabel! Isabel! come! come!" but the girl was too sick to hear or to mind. Holmes, hearing the mother's cry, climbed up the ship's side, (at great peril of his life, as was testified,) ran astern, and hoisting the sick girl upon his shoulders, swung himself and her over, by the tackle, by one arm, into the long-boat below. "O mother! I am coming! I am coming!" responded the girl, as Holmes was lowering himself and her along the ship's side.

On the trial, Holmes's Counsel, after describing, with effect, the earlier circumstances of the catastrophe, thus opened his defence:

"But hark! gentlemen. On that dreadful night, the crew and half the passengers having taken to the boats, the agonized voice of a mother is heard, even beyond the tumult and the outcry, calling for the preservation of her daughter, who in the consternation of the moment had been forgotten, and remained on board the fated ship. In an instant you see an athletick sailor passing hand over hand, by means of a slender rope, until he regains the vessel. Behold him now on the quarter-deck, with one arm entwined around a sickly and half naked girl, in the depth of the night, surrounded by icebergs and the ocean: while, with the other, he swings himself and his almost lifeless burthen, from the stern of the sinking ship into the boat below; and restores the child at once to the open arms and yearning heart of her mother! Yet, to-day, gentlemen, there, before you, sits that self-same heroick sailor, arraigned upon the charge of having *voluntarily* and *feloniously* deprived a fellow creature of his life: and *that*, gentlemen, is the charge which you are summoned here to determine."

body; never heard one speak against him; he was always obedient to officers; I never had a better man on board ship; he was a first rate man." *(Captain's deposition.)* While on the long-boat, in order to protect the women, he had parted with all his clothes, except his shirt and pantaloons; and his conduct and language to the women were kind. After Askin had been thrown out, some one asked, if any more were to be thrown over. "No," said Holmes, "no more shall be thrown over; if any more are lost, we will all be lost together." Of both passengers and crew, he finally became the only one whose energies and whose hopes did not sink into prostration. He was the first to descry the vessel which took them up, and by his exertions the ship was made to see, and finally, to save them.* APRIL SESSIONS, 1842 STATEMENT.

The prisoner was indicted under the Act of April 30th, 1790, "*For the punishment of certain crimes against the United States;*" (1 Story's L. U. S. p. 83,) an act which ordains, § 12, "that if any Seaman &c.

*"The passengers, on Wednesday morning," said one of the witnesses, "looked very distressed; and Holmes told them to keep their hearts up." "The mate," said another witness, "asked the men what he should do; Holmes said we ought not to steer for New-found-land, as we would never reach it; but to go south, as it would be warmer, and we might meet a vessel. The mate said he would do as Holmes wanted. He would give up all to Holmes."....." I saw Holmes with a quilt. He tried to raise it to make a sail; but the wind was too strong. He then stood up, and said that he saw the mast of a vessel; and afterwards got to work to raise a shawl on the end of an oar."

In fact, as appeared by other parts of the testimony, HOLMES' long trained, labouring eye descried the Crescent's main-mast, in the distance, several minutes before it was at all visible to any body on board: and while most of the boat's assemblage lay yet exhausted, or despairing, he had raised the signal of distress. His coolness, and deep knowledge of sea-life were not less manifested now, than his physical superiority had been before. The great distance of the Crescent rendered it almost impossible that Holmes' signal should be seen. The second mate of the vessel happened, however, to be aloft, watching for ice; and as soon as the ship, responding to the signal, put about, the voice of exultant joy and gratitude burst forth from the wretched assemblage on the long-boat. Some were crawling up the side of the boat to see the approaching vessel; and others, who had seemed congealed, now stood erect; "Lie down!" said Holmes, "every soul of you; and be still!" *If you make so many of us on board, they will steer off another way, and pretend they have not seen us."*

APRIL SIESSONS, 1842.

shall commit MANSLAUGHTER upon the high seas" &c., on conviction, he shall be imprisoned not exceeding three years, and fined not exceeding one thousand dollars. The Indictment charged that Holmes: FIRST, with force, &c. "unlawfully and feloniously" did make an assault &c. and cast and throw Askin from a *vessel*, belonging &c. *whose name was unknown*, into the high seas, by means of which &c. Askin, in and with the waters thereof, then and there was suffocated and drowned: SECOND, in the same way, on board the *Long-boat* of the ship William Brown, belonging &c. did make an assault &c. and cast &c.

STATEMENT.

The trial of the prisoner came on upon the thirteenth of April, 1842; a few days before the anniversary of the calamitous events referred to. The case was replete with incidents of deep romance, and of pathetick interest. These, not being connected with the law of the case, of course do not appear in this report: but they had become known, in a general way, to the publick, before the trial; and on the day assigned for the trial, at the opening of the Court, several stenographers connected with the news-paper press appeared within the Bar, ready to report the evidence for their expectant readers.

ORDER OF COURT. April 13th, 1842.

Mr. Justice BALDWIN, on taking his seat, now said: "By an act of Congress, passed some years since,*

* Act of March 2nd, 1831. 4th Story's L. U. S. p. 2256, by which it is enacted, "that the power of the several Courts of the United States to issue attachments and inflict summary punishments for contempt of Court, shall not be construed to extend to any cases except the misbehaviour of any person or persons in the presence of the said Courts, or so near thereto as to obstruct the administration of justice, the misbehaviour of any of the officers of the said Courts, in their official transactions, and the disobedience or resistance by any officer of the said Courts, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree or command of the said Courts."

the Court has no longer the power to punish, as for contempt, the publication of testimony pending a trial before us. We have, however, the power to regulate the admission of persons, and the character of proceedings within our own Bar; and as the Court perceives several persons apparently connected with the daily press, whose object, we presume, is to report the proceedings and evidence in this case, as it advances, the Court takes occasion to state, that no person will be allowed to come within the Bar of the Court for the purpose of reporting, except on condition of suspending all publication till after the trial is concluded. On compliance with this condition, and not otherwise, the Court will direct that a convenient place be afforded to the reporters of the Press."

April Sessions, 1842.

Order of Court. April 13th, 1842.

The reporters expressed their acquiescence in this Order of the Court; and the most respectful silence, on the part of the Press, prevailed during the whole trial.

The Prosecution was conducted by Mr. Wm. M. Meredith, D. A. U. S., Mr. Dallas, and Mr. O. Hopkinson: The Defence, by Mr. David Paul Brown, Mr. Hazlehurst, and Mr. Armstrong.

Mr. Dallas. The prisoner is charged with "unlawful" homicide, as distinguished from that sort which is malicious. His defence is, that the homicide was necessary to self-preservation. First then, we ask: Was the homicide thus necessary? that is to say: Was the danger instant, overwhelming, leav-

For the Prosecution. April 19th & 20th.

April Sessions, 1842.

ing no choice of means, no moment for deliberation? For unless the danger were of this sort, the prisoner, under any admission, had no right, without notice, or consultation, or lot, to sacrifice the lives of sixteen fellow-beings. Peril, even extreme peril, is not enough to justify a sacrifice such as this was. Nor would even the certainty of death be enough, if death were yet prospective. It must be *instant*. The Law regards every man's life as of equal value. It regards it, likewise, as of sacred value: Nor may any man take away his brother's life, but where the sacrifice is indispensable to save his own. [Mr. Dallas then examined the evidence; and contended that the danger was not so extreme as is requisite to justify homicide.]

For the Prosecution. April 19th & 20th.

But it will be answered, that death being certain, there was no obligation to wait until the moment of death had arrived. Admitting then, the fact that death was certain, and that the safety of some persons was to be promoted by an early sacrifice of the others, what law, we ask, gives a Crew, in such a case, to be the arbiters of life and death? settling, for themselves, both the time and the extent of the necessity? No! We protest against giving to seamen the power thus to make Jettison of human beings, as of so much cargo: of allowing sailors, for their own safety, to throw overboard, whenever they may like, whomsoever they may choose. If the mate and seamen believed that the ultimate safety of a portion was to be advanced by the sacrifice of another portion, it was the clear duty of that officer, and of the seamen, to give full notice to all on board.

Common settlement would, then, have fixed the principle of sacrifice: and, the mode of selection involving all, a sacrifice of any would have been resorted to only in dire extremity. April Sessions, 1842.

Thus far, the argument admits that at sea, sailor and passenger stand upon the same base, and in equal relations. But we take, THIRD, stronger ground. The seaman, we hold, is bound, beyond the passenger, to encounter the perils of the sea. To the last extremity, to death itself, must he protect the passenger. IT IS HIS DUTY. It is on account of these risks that he is paid. It is because the sailor is expected to expose himself to every danger, that beyond all mankind, by every law, his wages are secured to him. It is for this exposure, that the seamen's claims are a "sacred lien," and "that if only a single nail of the ship is left, they are entitled to it." (3rd Kent's Com. p. 197, and in note.) Exposure, risk, hardship, death, are the sailor's vocation; the seaman's daily bread. He must perform whatever belongs to his duty. To this effect speaks Lord BACON, when he says: "that the Law imposeth it upon every subject that he prefer the urgent service of his Prince and Country before the safety of his life." His Lordship goes on to say, that "if a man be commanded to bring ordnance or munition to relieve any of the King's towns that are distressed, then he cannot for any danger of tempest justify the throwing of them over-board; for there it holdeth which was spoken by the Roman when he alleged the same necessity of weather to hold him from embarking: 'NECESSE EST UT EAM; NON UT VIVAM." *(Bacon's* For the Prosecution. April 19th & 20th.

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Works, by Montagu; vol. 13th, p. 161. Lond. 1831.]*

No other doctrine than this one can be adopted. Promulge as Law that the prisoner is guiltless; and our marine will be disgraced in the eyes of civilized nations! The thousand ships which now traverse the ocean in safety, will be consigned to the absolute power of their crews: And, worse than the dangers of the sea, will be added such as come from the violence of men more reckless than any upon earth!

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Mr. Armstrong opened the defence; and was followed by Mr. Brown.

We protest against the prisoner being made a victim to the reputation of the marine law of the country. It cannot be, God forbid that it should ever be, that the sacrifice of innocence shall be the price at which the name and honour of American jurisprudence is to be preserved in this country, or in foreign lands! The malediction of an unrighteous sentence will rest more heavily on the law, than on the prisoner! This Court (it would be indecent to

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*The navy and army chronicles of England record many examples of Bacon's noble thought, "The duties of life are more than life." And certainly, in whatever circumstances witnessed, such testimonials will prove a vindication of all that Counsel here asserted. But most of these heroick examples (some of which were cited in the argument) have been on the part of Officers, in England especially, men of high associations, and often highly educated. And we are ready to resolve much into the instinct of discipline, and much, perhaps, into the incentive of ambition, seeking the bubble reputation.

An example more impressive than any of these, as it was that of a common sailor, occurred in our own country, on Lake Erie, in the destruction of the steam-boat Erie by fire, on the afternoon of the 9th of August, 1841. As soon as it was discovered that the flames could not be controlled, the Captain ordered the helmsman to make for land, then within sight: The man accordingly turned the vessel. The fire having taken near midships, quickly reached the binacle. Yet the man kept his post; and his hand was on the wheel. The wreathing flames ere long enclosed him; and when every soul had left the ship, his form was still to be seen amidst the flames; his clothes dropping from him; standing like a man of steel; and in performance of his duty, steering the flaming vessel to a headland.

think otherwise) will administer the law, "uncaring consequences." April Sessions, 1842.

But this case should be tried in a long-boat, sunk down to its very gunwale with forty-one half naked, starved, and shivering wretches; the boat leaking from below; filling from above; a hundred leagues from land; at midnight; surrounded by ice; unmanageable from its load, and subject to certain destruction from the change of the most changeful of the elements; the winds and the waves. To these superadd the horrours of famine and the recklessness of despair, madness, and all the prospects, past utterance, of this unutterable condition. Fairly to sit in judgment on the prisoner, we should, then, be actually translated to his situation. It was a conjuncture which no fancy can image. Terrour had assumed the throne of Reason; and Passion had become Judgment. Are the United States to come here, now! a year after the events; when it is impossible to estimate the elements which combined to make the risk, or to say to what extent the jeopardy was imminent: Are they, with square, rule and compass, deliberately to measure this boat, in this room: to weigh these passengers; call in philosophers; discuss specifick gravities; calculate, by the tables of a Life Insurance Company, the chances of life; and because they, these judges, find that by *their* calculation, this unfortunate boat's crew might have had the thousandth part of one poor chance of escape,—to condemn this prisoner to chains and a dungeon, for what he did in the terrour and darkness of that dark and terrible night! Such a mode of testing men's acts and motives is monstrous. For the Prisoner. April 20th, 21st and 22nd.

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We contend, therefore, that what is honestly and reasonably believed to be certain death, will justify self-defence to the degree requisite for excuse. According to Dr. Rutherford, (Inst. of Nat. Law, Book I, Chap. 16th, §5.) "This law," i. e. the law of Nature, "cannot be supposed to oblige a man to expose his life to such dangers as may be guarded against; and to *wait till the danger is just coming upon him*, before it allows him to secure himself." In other words: he need not wait till the certainty of the danger has been proved, past doubt, by its result. Yet this is the doctrine of the prosecution. They ask us to wait until the boat has sunk: we may, then, make an effort to prevent her from sinking. They tell us to wait till all are drowned: we may, then, make endeavours to save a part. They command us to stand still till we are all lost past possibility of redemption: and then we may rescue as many as can be saved!

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Where the danger is instantaneous, the mind is too much disturbed, says Rutherford, in a passage hereafter cited, to deliberate upon the method of providing for one's own safety, with the least hurt to an aggressor. The same author then proceeds: "I see not, therefore, any want of benevolence which can be reasonably charged upon a man in these circumstances, if he takes the most obvious way of preserving himself, *though perhaps some other method might have been found out, which would have preserved him as effectually, and have produced less hurt to the aggressor*, if he had been calm enough, and had been allowed time enough to deliberate about it." (Rutherf. Inst. of Nat. Law, Book 1, Ch. 16th, § 5.)

Nor is this the language of approved text writers alone. The doctrine has the solemnity of judicial establishment. In "*Grainger vs. The State,*" (5th Yerger's Rep. p. 459,) the Supreme Court of Tennessee deliberately adjudge, that "*if a man, though in no great danger of serious bodily harm, through fear, alarm or cowardice, kill another under the impression that great bodily injury is about to be inflicted on him, it is neither manslaughter nor murder, but self-defence.*" "It is a different thing," say the Supreme Court of the U. S., in *The Mariana Flora,* "to sit in judgment upon this case, after full legal investigations, aided by the regular evidence of all parties, and to draw conclusions at sea, with very imperfect means of ascertaining facts and principles which ought to direct the judgment." (11th Wheaton's Rep. p. 51.) The decision in the case just cited, carried out this principle into practice: as the case of *The Louis,* decided by SIR WILLIAM SCOTT, had done before. (2nd Dodson's Adm. Rep. p. 264.)

The Counsel cited Lord BACON, likewise, (*Works, by Montagu;* vol. 13th, p. 160, Lond. 1831,) and 4th Blackstone's Com. p. 186.

But the prospect of sinking was not imaginary. It was well founded. It is not to be supposed that Holmes, who, from infancy, had been a child of the ocean, was causelessly alarmed: and, there being no pretence of animosity, but the contrary, we must infer that the peril was extreme. As regards the two men cast over on Wednesday, the presumption is, that they were either frozen, or freezing to death. There being, at this time, no prospect of relief, the

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act is deprived of its barbarity. The evidence is that the two men were "very stiff with cold."

Besides: this indictment is in regard to *Askin* alone. There is no evidence of inhumanity on Tuesday night, when this throwing over began; though it is possible enough, that having proceeded so far in the work of horrour, the feelings of the crew became, at last, so disordered as to become unnatural. [The learned Counsel then examined the evidence, in order to shew the extremity of the danger.]

Counsel say that lots are the law of the ocean. Lots, in cases of famine, where means of subsistence are wanting for all the crew, is what the history of maritime disaster records; but who has ever told of casting lots at midnight; in a sinking boat; in the midst of darkness; of rain; of terrour and of confusion? To cast lots when all are going down, to decide who shall be spared; to cast lots when the question is, whether any can be saved, is a plan easy to suggest; rather difficult to put in practice. The danger was instantaneous; a case, says Rutherford, (Inst. of Nat. Law, Book 1, Ch. 16th, § 5.) when "the mind is too much disturbed to deliberate;" and where, if it were "more calm," there is no time for deliberation. The sailors adopted the only principle of selection which was possible in an emergency like theirs; a principle more humane than lots. Man and wife were not torn asunder; and the women were all preserved. Lots would have rendered impossible this clear dictate of humanity.

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[See Statement, ante, p. 6.]

But again: The crew either were in their ordinary and original state of subordination to their offi-

cers, or they were in a state of nature. If in the former state, they are excusable in law, for having obeyed the order of the mate; an order twice imperatively given. Independent of the mate's general authority in the Captain's absence, the Captain had pointedly directed the crew to obey all the mate's orders as they would his, the Captain's; and the crew had promised to do so. April Sessions, 1842. [See Statement, ante, p. 2.]

It imports not to declare, that a crew is not bound to obey an unlawful order; for to say that this order was unlawful, is to postulate what remains to be proved. Who is to judge of the unlawfulness? The circumstances were peculiar. The occasion was emergent; without precedent, or parallel. The lawfulness of the order is the very question which we are disputing; a question about which this whole community has been agitated, and is still divided; the discussion of which crowds this room with auditors past former example; a question which this Court, with all its resources, is now engaged in considering—as such a question demands to be considered—*most deliberately, most anxiously, most cautiously*. It is no part of a sailor's duty to moralize and to speculate, in such a moment as this was, upon the orders of his superiour officers. The commander of a ship, like the commander of an army, "gives desperate commands. He requires instantaneous obedience." The sailor, like the soldier, obeys by instinct. In the memorable, immortal words of CARNOT, when he surrendered Antwerp in obedience to a command which his pride, his patriotism, and his views of policy all combined to oppose: "THE ARM- For the Prisoner. April 20th, 21st and 22nd.

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ED FORCE IS ESSENTIALLY OBEDIENT: IT ACTS; BUT NEVER DELIBERATES." This greatest man of the French revolution did here but define with the precision of the algebraist, what he conceived with the comprehension of a statesman: and his answer was justification with every soldier in Europe! How far the principle was felt by this crew, let witness the case of this very mate, and of some of these very sailors, who, by the Captain's order, left the jolly-boat, which had but ten persons, for the long-boat, with more than four times that number. See ante, p. 2, in note. They all regarded this as going into the jaws of death: Yet not a murmer! It is a well known fact, that in no marine on the ocean, is obedience to orders so habitual and so implicit as in our own. The prisoner had been always distinguished by obedience.

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Whether the *mate*, if on trial here, would be found innocent, is a question which we need not decide. That question is a different one from the guilt or innocence of the *prisoner;* and one more difficult.

But if the whole company were reduced to a state of nature, then the sailors were bound to no duty, not mutual, to the passengers. The contract of the shipping articles had become dissolved by an unforeseen and overwhelming necessity. The sailor was no longer a sailor, but a drowning man. Having fairly done his duty to the last extremity, he was not to lose the rights of a human being, because he wore a roundabout instead of a frock-coat. We do not seek authorities for such doctrine. The instinct of these men's hearts is our authority; the best authority. Whoever opposes it must be wrong;

for he opposes human nature. All the contemplated conditions; all the contemplated possibilities of the voyage, were ended. The parties, sailor and passenger, were in a new state. All persons on board the vessel became equal. All became their own law givers; for artificial distinctions cease to prevail when men are reduced to the equality of nature. Every man on board had a right to make law with his own right hand: and the law which did prevail on that awful night having been the law of necessity, and the law of nature too, it is the law which will be upheld by this Court, to the liberation of this Prisoner. April Sessions, 1842.

On the 22nd April, the same day, MR. MEREDITH, D. A. replied, speaking principally to the evidence. Reply. April 22nd.

Mr. Justice BALDWIN proceeded, afterwards, to charge the jury.

He alluded to the touching character of the case; and after stating to the jury what was the offence laid in the indictment, his Honour explained, with particularity, the distinction between murder and manslaughter. He said that malice was of the essence of murder, while want of criminal intention was consistent with the nature of manslaughter: He impressed strongly upon the jury, that the mere absence of malice did not render homicide excusable; that the act might be unlawful, as well as the union of the act and intention; in which union consisted the crime of murder. After giving several familiar instances of manslaughter, to explain that although homicide was committed, there was yet an The Charge. April 22nd.

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absence of bad motive, his Honour proceeded with his charge nearly as follows: In such cases the law neither excuses the act nor permits it to be justified as innocent; but, although inflicting some punishment, she yet looks with a benignant eye through the thing done, to the mind and to the heart; and when, on a view of all the circumstances connected with the act, no evil spirit is discerned, her humanity forbids the exaction of life for life.

The Charge. April 22nd.

But though, said the Court, cases of this kind are viewed with tenderness, and punished in mercy, we must yet bear in mind, that man, in taking away the life of a fellow-being, assumes an awful responsibility to God, and to society; and that the administrators of publick justice do, themselves, assume that responsibility, if, when called on to pass, judicially, upon the act, they yield to the indulgence of mis-applied humanity. It is one thing to give a favourable interpretation to evidence in order to mitigate an offence. It is a different thing, when we are asked, not to extenuate, but to justify the act. In the former case, as I have said, our decision may, in some degree, be swayed by feelings of humanity; while in the latter, it is THE LAW OF NECESSITY, alone, which can disarm the vindicatory justice of the country. Where, indeed, a case does arise, embraced by this "law of necessity," the penal laws pass over such case in silence; for law is made to meet but the ordinary exigencies of life.

Homicide, in self-defence, is justifiable.

But the case does not become "a case of necessity," unless all ordinary means of self-preservation have been exhausted. The peril must be instant, overwhelming; leaving no alternative but to lose our own life, or to take the life of another person.

An illustration of this principle occurs in the ordinary case of self-defence against lawless violence aiming at the destruction of life, or designing to inflict grievous injury to the person; and within this range may fall the taking of life under other circumstances where the act is indispensably requisite to self-existence. For example: suppose that two persons who owe no duty to one another that is not mutual, should, by accident not attributable to either, be placed in a situation where both cannot survive. Neither is bound to save the other's life by sacrificing his own: nor would either commit a crime in saving his own life in a struggle for the only means of safety. Of this description of cases, are those which have been cited to you by counsel, from writers on natural law; cases which we rather leave to your imagination than attempt minutely to describe.

The Charge. April 22nd.

Or in self-preservation.

And I again state, that when this great "law of necessity" does apply, and is not improperly exercised, the taking of life is devested of unlawfulness.

But the parties must be in equal relations.

But in applying this law, we must look not only to the jeopardy in which the parties are, but also to the relations in which they stand.

The slayer must be under no obligation to make his own safety secondary to the safety of others.

A familiar application of this principle presents itself in the obligations which rest upon the owners of stages, steam-boats, and other vehicles of transportation. In consideration of the payment of fare, the owners of the vehicle are bound to transport the passengers to the place of contemplated destination. Having, in all emergencies, the conduct of the journey, and the control of the passengers, the owners

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rest under every obligation for care, skill, and general capacity; and if, from defect of any of these requisites, grievous injury is done to the passenger, the persons employed are liable. The passenger owes no duty but submission: he is under no obligation to protect and keep the conductor in safety; nor is the passenger bound to labour, except in cases of emergency; where his services are required by unanticipated and uncommon danger.

The Charge. April 22nd.

Such, said the Court, is the relation which exists on ship-board. The passenger stands in a position different from that of the officers and seamen: it is the sailor who must encounter the hardships and perils of the voyage.

Seamen not absolved from duty by danger.

Nor can this relation be changed when the ship is lost by tempest or other danger of the sea, and all on board have betaken themselves, for safety, to the small boats; for imminence of danger cannot absolve from duty. The sailor is bound, as before, to undergo whatever hazard is necessary to preserve the boat and the passengers. Should the emergency become so extreme as to call for the sacrifice of life, there can be no reason why the law does not still remain the same: the passenger, not being bound either to labour or to incur the risk of life, cannot be bound to sacrifice his existence to preserve the sailor's. The Captain, indeed, and a sufficient number of seamen to navigate the boat, must be preserved; for *except these abide in the ship, all will* [Acts xxvii, 31.] *perish;* but if there be more seamen than are necessary to manage the boat, the supernumerary sailors have no right, for *their* safety, to sacrifice the

passengers. The sailors and passengers, in fact, cannot be regarded as in equal positions. The sailor (to use the language of a distinguished writer) *owes more benevolence to another than to himself:* he is bound to set a greater value on the life of others than on his own; and while we admit that sailor and sailor may lawfully struggle with each other for the plank which can save but one, we think that if the passenger is on the plank, even "the law of necessity" justifies not the sailor who takes it from him.

The Charge. April 22nd.

Seamen not absolved from duty by danger.

This rule may be deemed a harsh one towards the sailor, who may have thus far done his duty: but when the danger is so extreme, that the only hope is in sacrificing either a sailor or a passenger, any alternative is hard; and would it not be the hardest of any, to sacrifice a passenger in order to save a supernumerary sailor?

But in addition: If the source of the danger have been obvious, and destruction ascertained to be certainly about to arrive, though at a future time, there should be consultation, and some mode of selection fixed, by which those in equal relations may have equal chance for their life. By what mode then should selection be made? The question is not without difficulty; nor do we know of any rule prescribed either by statute or by common law, or even by speculative writers on the law of nature.

If the exigence allow, there should be consultation.

In fact, no rule of general application can be prescribed for contingencies which are wholly unforeseen. There is, however, one condition of extremi-

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ty for which all writers have prescribed the same rule. When the ship is in no danger of sinking, but all sustenance is exhausted, and a sacrifice of one person is necessary to appease the hunger of others, the selection is by lot. This mode is resorted to as the fairest mode; and, in some sort, as an appeal to God for selection of the victim. This manner, obviously, was regarded by the mate, in parting with the Captain, as the one which it was proper to adopt, in case the long-boat could not live with all who were on board on Tuesday morning. The same manner, as would appear from the response given to the mate, had already suggested itself to the Captain.

The Charge. April 22nd.

[See Statement, ante, p. 4.]

For ourselves, we can conceive of no mode so consonant both to humanity and to justice; and the occasion, we think, must be peculiar, which will dispense with its exercise. If, indeed, the peril be instant and overwhelming, leaving no chance of means, and no moment for deliberation; then, of course, there is no power to consult, to cast lots, or in any such way to decide: but even where the final disaster is thus sudden, if it have been foreseen as certainly about to arrive; if no new cause of danger have arisen to bring on the closing catastrophe; if time have existed to cast lots, and to select the victims: then, as we have said, sortition should be adopted. In no other than this or some like way, are those having equal rights, put upon an equal footing; and in no other way is it possible to guard against partiality and oppression, violence and conflict. What scene, indeed, more horrible, can imagination draw, than a struggle between sailor and

The Court approve of a decision by lots when practicable.

sailor, passenger and passenger, or it may be, a mixed affray, in which, promiscuously, all destroy one another! this too, in circumstances which have allowed time to decide, with justice, whose life should be calmly surrendered. APRIL SESSIONS, 1842. THE CHARGE. April 22nd.

When the selection has been made by lots, the victim yields of course to his fate; or, if he resist, force may be employed to coerce submission. The Court approve of a decision by lots when practicable.

Whether or not "a case of necessity" has arisen, or whether the law under which death has been inflicted have been so exercised as to hold the executioner harmless, cannot depend on his own opinion; for no man may pass upon his own conduct when it concerns the rights, and especially, when it affects the lives of others. We have already stated to you, that by the law of the land, homicide is sometimes justifiable: and the law defines the occasions in which it is so. The transaction must, therefore, be justified to the law; and the person accused rests under obligation to satisfy those who judicially scrutinize his case, that it really transcended ordinary rules. In fact, any other principle would be followed by pernicious results; and, moreover, would not be practicable in application. Opinion or belief may be assumed, whether it exist or not: and if this mere opinion of the sailors will justify *them* in making a sacrifice of the passengers, of course, the mere opinion of the passengers would, in turn, justify *these* in making a sacrifice of the sailors. The passengers may have confidence in their own capacity to manage and preserve the boat; or the effort of either sailors or passengers to save the boat, may The Jury must be convinced of the necessity of the homicide.

April Sessions, 1842

be clearly unavailing; and what, then, in a struggle against force and numbers, becomes of the safety of the seamen? Hard as is a seaman's life, would it not become yet more perilous, if the passengers, who may out-number them ten-fold, should be allowed to judge when the dangers of the sea will justify a sacrifice of life? We are, therefore, satisfied, that in requiring proof which shall be satisfactory to *you*, of the existence of the necessity, we are fixing the rule which is, not merely the only one that is practicable, but, moreover, the only one which will secure the safety of the sailors themselves.

The Charge. April 22nd.

The Court said, briefly, that the principles which had been laid down by them, as applicable to the crew, applied to the mate likewise; and that his order, (on which much stress had been laid,) if an unlawful order, would be no justification to the seamen; for that even seamen are not justified, in law, by obedience to commands which are unlawful.

The Court added, that the case was one which involved questions of gravest consideration; and as the facts, in some sort, were without precedent, that the Court preferred to state the law, in the shape of such general principles as would comprehend the case, under any view which the jury might take of the evidence.

Verdict. April 23rd.

After a few remarks upon the evidence, the case was given to the jury; who, about sixteen hours afterwards, and after having once returned to the Bar, unable to agree, with some difficulty found a verdict of Guilty. The prisoner was, however, recommended to the mercy of the Court.

On the same day, a rule was obtained to shew cause why JUDGMENT should not be ARRESTED and A NEW TRIAL GRANTED. The following ground was relied on for a new trial: Because the Court, instead of telling the jury that in a state of imminent and deadly peril, all men are reduced to *a state of nature*, and that there is, then, no distinction between the rights of sailor and passenger, adopted a contrary doctrine, and charged the jury accordingly. APRIL SESSIONS, 1842. Application and reason for arrest of judgment, and for a new trial.

Mr. Brown subsequently *shewed cause*. He insisted largely upon the existence of the state of nature, as distinguished from the social state; and contended that to this state of nature the persons in the long-boat had become reduced on Tuesday night, at ten o'clock, when Askin was thrown over-board. He iterated, illustrated, and enforced the argument contained in the closing part of the defence. For the arrest of judgment he argued, that the indictment was defective in not stating the name of the boat on which the homicide was alleged to have been committed; that the counts in this respect wanted certainty. Cause shewn for new trial. May 7th. [Ante. pp. 20 and 21.] [Ante, p. 10.]

The United States did not reply.

The Court held the application for some days under advisement; and, at a subsequent day, DISCHARGED THE RULE. They said, that during the trial, (aware that no similar case was recorded in juridical annals,) they had given to the subject studious and deliberate consideration; and they had paid like regard to what was now urged; but that notwithstanding all that had been said, (and the ar- Mr. Justice Baldwin. May 12th. Motion overruled.

April Sessions, 1842.

guments, it was admitted, were powerful,) no errour had been perceived by the Court in its instructions to the jury.

Mr. Justice Baldwin. May 12th. Motion overruled.

It is true, (said the Court,) as is known by every one, that we do find in the text writers, and sometimes in judicial opinions, the phrases: "the law of nature;" "the principles of natural right;" and other expressions of a like signification: but, as applied to civilized men, nothing more can be meant by those expressions than that there are certain great and fundamental principles of justice which, in the constitution of nature, lie at the foundation and make part of all civil law, independently of express adoption or enactment. And to give to the expressions any other signification; to claim them as shewing an independent code, and one contrariant to those settled principles, which, however modified, make a part of civil law in all Christian nations: would be, to make the writers who use the expressions, lay down, as rules of action, principles which, in their nature, admit of no practical ascertainment or application. The law of nature forms part of the municipal law; and in a proper case, (as of self-defence,) homicide is justifiable, not because the municipal law is subverted by the law of nature, but because no rule of the municipal law makes homicide, in such cases, criminal. It is, said the Court, the municipal or civil law, as thus comprehensive; as founded in moral and social justice; the law of the land, in short, as existing and administered amongst us and all enlightened nations: that regulates the social duties of men, the duties of man towards his neighbour, every where. Every where

A state of nature exists only in savage independence.

are civilized men under its protection: every where subject to its authority. It is part of the universal law. We cannot escape it, in a case where it is applicable: and if for the decision of any question the proper rule is to be found in the municipal law, no code can be referred to as annulling its authority. APRIL SESSIONS, 1842.

Varying however, or however modified, the laws of all civilized nations, and, indeed, the very nature of the social constitution, place sailors and passengers in different relations. And without stopping to speculate upon over-nice questions not before us, or to involve ourselves in the labyrinth of ethical subtleties, we may safely say, that the sailor's duty is, the protection of the persons intrusted to his care; not their sacrifice;—a duty, we must again declare our opinion, that rests on him in every emergency of his calling; and from which it would be senseless, indeed, to absolve him exactly at those times when the obligation is most needed. Mr. Justice Baldwin. May 12th. Motion overruled.

Respecting the form of the counts, the Court said, that the locality of the offence was sufficiently expressed; and that in a case so peculiar it was impossible to express the place with more precision.

When the prisoner was brought up for SENTENCE, the learned judge said to him, that many circumstances in the affair were of a character to commend him to regard; yet, that the case was one in which some punishment was demanded: that it was in the power of the Court to inflict the penalty of an imprisonment for a term of three years, and a fine of one thousand dollars; but, in view of all the Sentence, same day.

April Sessions, 1842.

circumstances, and especially as the prisoner had been already confined in gaol several months, that the Court would make the punishment more lenient. The convict was then sentenced to undergo an imprisonment in the Eastern Penitentiary of Pennsylvania, (solitary confinement,) at hard labour, for the term of six months, and to pay a fine of twenty dollars.

Pardon refused.

[Note. Considerable sympathy having been excited in favour of Holmes, by the popular press, an effort was made by several persons, and particularly by The Seaman's Friend Society, to obtain a pardon from the Executive. President Tyler refused however to grant any pardon, in consequence of the Court's not uniting in the application: the penalty was subsequently remitted.]

[OCTOBER SESSIONS, 1841, NO. 6, CRIMINAL DOCKET.]

Memorandum.

May 30th, 1842: Mr. Meredith having resigned the office of District Attorney, to which he had been appointed by the late President, W. H. Harrison; Henry M. Watts, Esquire, by commission dated this day, from President Tyler, succeeded to the place.

THE ROBERT MORRIS.

(ADMIRALTY JURISDICTION.)

Where the larger portion of a voyage is upon tide-water, the jurisdiction of the admiralty is not ousted by the fact that the residue (the terminations, each way, of the voyage) is upon water of a different character; as, for example, on a canal.

In the case here reported, the tide navigation compared with that of the canal, in the ratio of twenty-three to fifteen and five sixteenths.

Oct. Sessions, 1842.

Statement.

THE ROBERT MORRIS, libelled in this case, had been originally built for a *canal boat;* and was used as such for several years. She was then "raised on," fitted with standing mast and schooner rigging, and was otherwise so ALTERED as to navigate *either canals or larger waters.* Thus fitted, she was in the custom of bringing lime from Norristown, (a place on the Schuylkill *canal,* and seventeen miles from tide-water,) to the *tide-water river,* Schuylkill; and, descending that river and its recipient, the Delaware, for about forty-six miles, of going through the Chesapeake and Delaware *canal,* thirteen miles and five eighths, into the state of Maryland. Returning thence, she brought wood to the city of Philadelphia, and went up again to Norristown. Her *canal* navigation was therefore *thirty miles and five eighths;* that on *tide-water, forty-six miles.* Her *papers* were

Oct. Sessions, 1842.

for the coasting trade; but she had never been out to sea, further than to cross, once, the Chesapeake bay to Baltimore.

Statement.

The question was JURISDICTION; a point on which the District Court had decided affirmatively, and on which the case now came, by appeal, into this Court.

Against the jurisdiction. Nov. 7th.

Mr. HORATIO HUBBELL for the appellant: To authorize the high and ancient process of the admiralty, the water ought to be, if not the "high seas," at least "within the ebb and flow of the tide;" that is, exclusively within this ebb and flow. The expression last quoted, is the immemorial form of the admiralty libel; and, being so, should be taken as the measure of the admiralty jurisdiction; "for," says C. J. GIBSON, with memorable wisdom, "The forms of the law are the indices and conservatories of its principles."

[Fritz v. Thomas, 1 Wharton, 71.]

At the present day, nearly all our larger rivers form the mouths of canals; and if an initiatory, or a mediate, or a concluding passage over tide-water have power to transfuse virtue to every other (no matter how distant) part of the navigation; then will you bring into admiralty jurisdiction all the canals which empty into tide-rivers. All canal boats will come to be "ships navigating the high seas," and the delvings of a mud-scow will be "maritime services."

"The ebb and flow of the tide," that is, tide-water exclusively, brings into the admiralty much busi-

ness beneath the Court's original design and dignity; for all the small craft of every tide-river, fresh or salt, is even now brought here. This result, however, is an evil which can't be avoided. It arises from the fact that the Court seeks a certain, definite, and easily ascertained limit of water. But it is an evil; not a thing which the Court seeks. Transcend, however, this palpable bound of tide-water, and you will increase the evil, while you will destroy the advantage for which an evil comes to be tolerated at all. Oct. Sessions, 1842.

Then, what proportion of ebb and flow will you require? Would you, for example, contend, if a vessel came one hundred miles along a canal, to a tide-river a mile wide, crossed that river, and proceeded a hundred miles in another canal; that the case would come within admiralty jurisdiction? If you say that the body of the voyage, in the case of the Robert Morris, was performed on tide-water, we answer, that words are wrongly used; for there was nearly as much canal as river. Against the jurisdiction. Nov. 7th.

The vessel was built for a canal boat, originally: she was long used as a canal boat; and she is a canal boat still. It is clear that the canal is her element.

As for the boat's papers, that is naught. Every boat which sails on tide-water at all, and carries a certain amount of goods, will have coasting papers; unless she be a foreign vessel; in which last case she has a certificate of registry. [Acts of Dec. 31st, 1792, & Feb. 18th, 1793.]

The Counsel then referred to the case of *Thackerey vs. The Farmer*, (Gilpin's Adm. Rep. p. 526,)

Oct. Sessions, 1842.

where Judge Hopkinson complained of the sorts of applications which of late began to be made to the admiralty; and expressed in general language a determination to limit the growing business of the Court to cases palpably within its jurisdiction.

Mr. Vandyke for the jurisdiction: If this same vessel had passed over the tide-water alone, excluding the canals, the jurisdiction would confessedly exist. How then is it destroyed by the fact, that in addition to having passed over water of the requisite character, the vessel has been upon other water not requisite? There is enough in the case to give jurisdiction, and there is, besides, something which is useless. How is that which is efficacious destroyed by what is ineffective? Even ships which traverse the ocean may have the termini of their voyage on waters which reach beyond the ebb and flow of the tide: yet it has never been heard that such vessels cease, by the incident just mentioned, to be subjects for admiralty jurisdiction.

For the libellant. Nov. 7th & 8th.

It is said by Counsel on the other side, that tide-water can't transfuse virtue into that which is still. The remark has no bearing; for we rely on the tide-water alone. But, at all events, is it not as easy to conceive that tide-water may give virtue to that which is still, as that still water shall destroy the virtue of that which is tide?

Howbeit: the doctrine for which we contend may be regarded as settled; for the Supreme Court, indirectly at least, have recognized it as law. In *The Steam-boat Thomas Jefferson*, (10th Wheaton's Rep.

p. 428) the Court dismissed a libel, because "the voyage, not only in its commencement and termination, *but in all its intermediate progress*, was several hundreds of miles above the ebb and flow of the tide;" but while the Court asserts that the ebb and flow of the tide is "the prescribed limit which it was not at liberty to transcend," they proceed to declare that "there is no doubt that the jurisdiction exists, *although the commencement or termination of the voyage may happen to be at some place beyond the reach of the tide.*" (p. 429.) Oct. Sessions, 1842.

Whatever may be the law in the case supposed by Counsel, viz: where the proportion of tide-water is greatly less than that of dead navigation, the result does not affect this case now before us. But, in fact, the supposed case would be excluded by the test which was adopted by the Supreme Court, in *The Steam-boat Orleans vs. Phœbus.* (11th Peters's Rep. p. 175.) The test is, "whether the vessel be engaged, substantially, in maritime navigation, or in interior navigation and trade, not on tide-waters." (p. 183.) The case before the Court, on the other hand, does fall within this test; for although the beginning of the voyage was on one canal, and the termination of it on another, the vessel was not engaged substantially in interiour navigation and trade, not on tide-water. For the libellant. Nov. 7th & 8th.

As for what was said by the District Court in *Thackerey vs. The Farmer*, reported by Mr. Gilpin, it was the general words of a single judge: and had the case been a decision in point, it ought not (proceeding from an inferiour jurisdiction) to be cited to this Court. (Gilp. Ad. Rep. 526.)

Oct. Sessions, 1842.

Reply. Nov. 8th.

Mr. Hubbell, in reply, said, that in both the cases cited from the decisions of the Supreme Court, the libel had been dismissed. So far then, as the point decided was concerned, both cases were against the Counsel: and, for the rest, general expressions, or admissions made arguendo, or supposed cases put by way of contrast, could not be regarded as absolute propositions, or possessing authority. The case before the Court, was, then, as yet, undecided: and the Court was about to shut or to open the gates to a flood of business from inferiour jurisdictions.

The Court. Nov. 12th.

The Court, after holding the case for some days under advisement, decided IN FAVOUR OF THE JURISDICTION. Mr. Justice BALDWIN, who delivered the opinion, referred to the cases of *The Steam-boat Orleans vs. Phœbus*, and *The Steam-boat Thomas Jefferson;* decisions already presented in the argument for the jurisdiction. His Honour commented, particularly, on their language as quoted in the argument, and said, that the voyages of The Robert Morris, although not, exclusively, on tide-water, could not, yet, be characterized as, in their main, "interiour." The learned judge had always been much reluctant to extend the admiralty jurisdiction beyond the limits which marked it at our revolution; and this reluctance still existed: but he thought that the case now before him fell, as the decisions cited had shown, within the range of principles already recognized as law: and the Supreme Court of the United States was a tribunal whose wisdom he could not disturb.

[10th Wheaton, 428: & 11th Peters, 175.]

Decree of the Dist. Ct. affirmed.

[OCTOBER SESSIONS, 1842, NO. 3, COMMON LAW DOCKET.]

LA VEUVE DUSSERT VS. DOE.

(EVIDENCE: PEDIGREE.)

Where several persons, all of whom testify to considerable acquaintance with a family, swear that a particular person's pedigree was matter of *common reputation*, (notoriété publique,) it will be inferred, that reputation in the family is meant to be included; although not so in any way said: This, at least, in favour of depositions taken abroad; when the opposite party has not chosen to cross-examine, nor offered counter evidence; and when the depositions present general evidence of candour. The circumstances last mentioned are considerations which may properly weigh with the Court, and induce the admission of testimony which, in opposite circumstances, might give pause.

APRIL SESSIONS, 1843.

A question as to the plaintiff's PEDIGREE, arising in this case, MALLERY, for the defendants, objected to certain depositions taken at l'Orient in France, in 1840, to shew the descent. The plaintiff's family had resided for many years at l'Orient, where all the witnesses, of whom there were four, likewise lived. But her father, a merchant, had died at Le Puy, in 1786, and a brother, in this country.

STATEMENT.

One of the witnesses, a merchant, sixty years old, had personally known Madame Dussert for more than *thirty years*. He had also known her relatives and family, by various connexions (différents rapports) which he had had with her or her sister in COMMERCIAL DEALINGS (à raison d'affaires commerciales) for about twenty or thirty years. But in

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answer to a question as to the MEANS of his knowledge of this pedigree, the witness answered, that it was derived from Madame Dussert deceased (THE PRESENT PLAINTIFF) and *par la notoriété publique.** The testimony of two other witnesses, (one aged 39, and the other 45,) whose acquaintance with the family arose likewise through BUSINESS RELATIONS, (in both cases, however, of much less standing than that of the first witness,) gave the SAME answers as to their source of knowledge. But a fourth witness, a retired officer of the navy, (in which Madame Dussert had had a brother,) had known her and her family for twenty-four years, by SOCIAL AND FRIENDLY INTERCOURSE (rapports de société et d'amitié) with her and her sister: and he had derived his knowledge of her pedigree, from what he had learned from her MOTHER, her BROTHER, (the navy-officer,) and by this same "notoriété publique."

STATEMENT.

Except as inference from these dates, it did not appear WHEN the knowledge derived from these last named persons as to Madame Dussert's pedigree had been communicated.

The *sister*, mentioned in the depositions of the first and the last witness, was the survivor of Madame Dussert's family, *and at the time the depositions were taken, had become the sole beneficiary of the suit.*

The present action, which was *ejectment*, and the DEFENCE to which *was twenty-one years adverse pos-*

*The plaintiff's interrogatory as filed in English, asked: "Are you conversant with her pedigree, by direct knowledge; by declarations of deceased members of her family, or from general reputation?" This last expression the commissioners translated "notoriété publique," and the witness, responding affirmatively, used the same words.

*session,** was brought in the year 1832. And the evidence left it *in doubt* whether or not the statements of the mother and sister to the ex-officer had or had not been after a *lis mota*, and the descent had become a question. No one of the witnesses was related nor affined to the family of Madame Dussert; but each of them stated, in reply to the plaintiff's interrogatories, the dates and places of the several members' deaths, in a way to indicate entire acquaintance, through some means, with the family history in these particulars. What these means were did not appear; but as to some of the dates specified, it was impossible that the younger witnesses should have known them otherwise than by information from others.

APRIL SESSIONS, 1843.

STATEMENT.

The general complexion of the testimony, as respects the intelligence and education of the witnesses, was good.

The defendant had not joined in naming commissioners; and had not cross-examined.

Mr. MALLERY, in support of his objection: Evidence of common reputation may be received in matters of PUBLICK AND GENERAL INTEREST, a claim of highway, for example; because, all persons being interested in such matters, every one is presumed to have knowledge concerning them. But even in regard to such matters, proper means of information must be first shown; such as, in the case of a highway, being acquainted with the neighbourhood, or frequently using the road. Otherwise, the evidence is not only worthless, but *inadmissible*. The princi-

Against the depositions. June 19th.

*The verdict having been for the plaintiff, this defence, it must be taken, was not made out; but the defendant shewed a possession of several years.

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ple on which such evidence is received, is the one already stated; viz. that the facts are PUBLICK facts, concerning the truth of which every person has an interest to inform himself. See the case of *Crease vs. Barrett*, (1st Crompton, Meeson and Roscoe's Rep. pp. 919, 929.) But what interest can the publick have in the birth of a common child? or of what value is common rumour in regard to such a fact? a fact which, as in this case, must have occurred more than half a century before the testimony was given.

Against the depositions. June 19th.

Hence it is well settled, that common reputation is not evidence in regard to pedigree. Dr. GREENLEAF, in his recent authoritative treatise on evidence, after a careful collection of the cases, thus presents their result: "There are reported cases, in which the declarations of servants, and even of neighbours and friends, have been admitted. BUT IT IS NOW SETTLED, that the law resorts to hearsay evidence in cases of pedigree, upon the ground of the interest of the declarants in the person from whom the descent is made out, and their consequent interest in knowing the connexions of the family. *The rule of admission is, therefore, restricted to the declarations of deceased persons, who were related by blood or marriage, to the person, and, therefore, interested in the succession in question.*" (TREAT. on the law of Evid. Pt. II. Ch. V. § 103.)

It is to be observed that not one of these four witnesses swears to general repute in the *family:* it is to a "notoriété publique," alone; that is common rumour; no base whereon to rest judicial decree!

Is the case altered by what is said to have been derived from the family? As to what came from Madame Dussert the plaintiff, or from her sister, (for many years before these depositions were taken, the beneficiary of the suit,) it is clearly inadmissible. Then as for what was said by the mother. It is doubtful whether this was not said *post litem motam*. Now, first of all we must remember that the admission of hearsay testimony, at all, is in opposition to a maxim of the law, of more pervading influence than perhaps any other. The statements offered in evidence must appear to be the "natural effusions" of the mind of the party making them; and being, at best, received with jealousy, it is incumbent on whomsoever offers them, to clear away every suspicion that may rest upon them. It is not enough that the evidence *may* be true. It must present every credential of truth upon its face. This was the doctrine held by a great majority of the judges in the Berkeley peerage case; a case to which the attention of the Court is particularly directed, and which, being in the house of Lords, is of the highest authority. Then the defence in this case is, the statute of limitations, or an ADVERSE possession for TWENTY-ONE years before suit brought: and strong evidence has been given to support this defence. Now, admit that what was said by Madame Dussert was before suit brought, yet is it certainly clear that it was *ante litem motam?* The line of distinction is, not the commencement of the suit, but the origin of the controversy. Being an ejectment, the case is not one for favourable presumptions. "The plaintiff" says one case "must remove every

April Sessions, 1843.

Against the depositions. June 19th.

[4th Campbell, 401.]

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possibility of title in another person, before he can recover; no presumption being to be admitted against the person in possession." *Richards vs. Richards,* (15th East's Rep. p. 293, note) The plaintiff was a foreigner, a female, a widow, in a distant country; and there was no pressing necessity to bring a suit until the twenty-one years were about to expire.

Against the depositions. June 19th.

But, finally, this hearsay is admitted under the condition that it is the best evidence which the case allows. And with us, where, except the family bible, a registry is scarcely known; where there is but little motive of any sort, to perpetuate a knowledge of genealogies or pedigree; such evidence is well received; for in the nature of the case there can rarely be better. And this remark, though in a less extent, applies in England likewise. But in France, where marriage is a sacrament of the Church, and baptism is scarcely ever omitted; where wills, and births and deaths are all *enrégistrés devant notaire;* and every man has his *acte de naissance;* surely if the descent be as is alleged, some better evidence of it than such as is produced here, must exist; better than that of persons who appear to have been nowise connected with the family but in the course of commercial dealings; or than that of a person who, by force of his vocation, must have passed the greater part of his life at sea. Are there no family letters? nor deeds? nor recitals? Where is the father's will? or where any evidence of a devolution of property? The evidence then, it is clear, is not the best of which the case admits; and though it may be hard on this plaintiff to reject evidence which may cause

a loss of the suit, yet the Court will act upon the wise sentiment of Lord ELDON, in a kindred case: "Your lordships will look hardships in the face rather than break down the rules of law." APRIL SESSIONS, 1843. [Berkeley Peerage Case.]

Mr. C. INGERSOLL, in support of the evidence: The father of Madame Dussert died in 1786; more than half a century before the depositions were taken. Direct evidence of marriage and birth cannot be required after such a term of years; for it would be impossible to obtain it. We have enough: we have persons of various ages and professions, all acquainted with the family through a series of years, and ALL testifying that the pedigree of Madame Dussert was matter of publick *notoriety*. The Court will infer from the acquaintance proved with the family, that this notoriety means to include notoriety or common reputation in the *family;* and that is enough. *Doe vs. Griffin*, (15th East's Rep. p. 293.) In favour of the depositions. June 19th.

The depositions are in a foreign tongue, and the precise requirements of our law were probably understood by neither commissioners nor witnesses. The defendant did not name commissioners: he did not cross-examine; and the testimony is unimpeached; for he has offered none in rebuttal. In such a case no Court will scan with eagle eyes.

As respects the *lis mota*, the question, by concession, is but doubtful; and this should not be enough to exclude the evidence. The Berkeley peerage case settled no *such* principle of exclusion. The testimony there offered had been made, not only *post litem motam*, but PROPTER *litem motam*. To

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be sure, the Court will not make difficult presumptions to support any testimony; neither will it make impossible ones for an opposite purpose.

COURT'S OPINION June 19th.

BALDWIN, J: The rules of evidence are not absolutely inflexible; and where testimony bears strong general marks of candour, and an opposing party has neither cross-examined the witness, nor attempted to impeach the testimony by adducing counter evidence, a Court, generally speaking, is not extreme in its requirements; especially where, as in this case, the evidence comes through the channels of a foreign language and a foreign commission. In such cases, testimony will sometimes be received, in regard to which, in other circumstances, the Court would be more strict. We think, that under the circumstances of this case, it may be intended that the witnesses, two of whom appear to have been considerably acquainted with the family of Madame Dussert, designed by the expression *notoriété publique*, to include general reputation in the family.

[A verdict was given, June 30th, for the plaintiff; but the point reserved was never brought again before the Court.]

The point being thus rested, it is not so important that we express an opinion as to the statements of the mother and brother; which it is matter of doubt whether they were made *ante* or *post litem motam*. The defendant's counsel has argued very well against the reception of such testimony; but we rather incline, on first impression, to think that it is admissible. You may read the testimony, but we will reserve the point of law for future consideration, should it be rendered necessary.

WILCOCKS VS. PHILLIPS' EXECUTORS.

(PROOF OF FOREIGN LAWS.)

(LEGATEE'S COMPETENCY AS A WITNESS.)

(SHIP-OWNER AND CAPTAIN. USAGE. AGENCY.)

While in the case of an isolated and peculiar nation, like China, there may be admitted parol evidence of its laws, and this from persons not jurisconsults, yet such evidence will be received only where it is so direct and positive as to be quite free from ambiguity.

A paid legatee is a competent witness where payment has been made by the executor, voluntarily, with knowledge of the claim sued upon, and without a refunding bond, and a long time has elapsed since the death of the testator. The length of time is regulated by analogy to the statute of limitations.

The relative rights of ship-owner and captain stated; and the captain and ship having been employed in an Eastern country in a service not strictly within their ordinary offices, and not, originally, in any way contemplated, the captain was regarded as not being a mere agent of the ship-owner; and was accordingly allowed to receive compensation on his own account, from the parties with whom he dealt; the compensation, though large, appearing to be *somewhat in the nature of a present.*

The doctrine of usage and agency stated; and considerable efficacy given to usage in a particular trade. Similar effect given to a settlement of accounts made by a party's general agent abroad and acquiesced in by the principal here for four years; and particularly where a party was dead.

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STATEMENT.

Mr. WILCOCKS, the plaintiff, was the sole owner of the ship *Scattergood*, of which Phillips, the defendants' testator, in his lifetime, was captain. In the early part of 1829, the ship was sent out by the plaintiff from Philadelphia to Canton, under a char-

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ter-party. Phillips was to receive the regular wages of a master, and to have the privilege of certain tonnage.* One Latimer was at this time the plaintiff's *general agent* in China, clothed with very extensive and discretionary power, and the ship and captain were put under his orders, and directed to be governed entirely by him. The ship *Levant*, belonging to Perkins of Boston, and lying at Lintin (near Canton) as an opium store-ship, became disabled soon after the Scattergood arrived there; and by an arrangement between Mr. Latimer and the agent of Perkins, the Scattergood *took the place of the Levant;* and continued to be employed for twenty-two months as an OPIUM STORE-SHIP. The business of this sort of ship, otherwise called a receiving ship or go-down, is to receive opium from the regular transporting ships, keep it in store, and deliver it out when sold to the Chinese. There is paid for the STORAGE of opium in such ships, a regular charge of two dollars a month, per box, and, besides this, upon the delivery of the opium to a purchaser or smuggler, is paid a *kumshaw* of five dollars for each box. The number of boxes of opium stored in this ship was about *five thousand.* The kumshaws were received, in part, by captain Phillips, aboard, and, in part, by Mr. Latimer, ashore, and paid over by him to captain Phillips; but no express agreement was made respecting the right to them.

*By this is meant, a right to carry a certain amount free of freight, or to receive a certain part of the freight.

STATEMENT.

To recover these kumshaws (which the plaintiff claimed as part of the SHIP'S EARNINGS) *was the object of the present action of assumpsit.*

First Point of Evidence.

Statement.

In the course of the trial, the deposition of an individual who was Captain of a large ship trading to China, was read by the plaintiff. In his cross-examination by the defendant's counsel, in answer to a question as to what was the cause of the kumshaw's being greater on opium than that on salt-petre, this person said, that he supposed it was because of the greater value of opium; "for," said he, "*salt-petre is prohibited by law, so far as I know, as well as opium.*"

As it was possible that the illegality of the opium trade would become an important point for the defendant, the plaintiff's counsel objected to the reading of this answer, because it tended to no purpose but to shew the illegality of the trade in opium; and, as shewing this, that it was incompetent.

Plaintiff's argument on first point of evidence. October 14th.

The point was argued, on both sides, at some length. For the plaintiff, it was said: 1st. This is matter of law. The witness, himself, says: "prohibited by *law*." From the nature of the case, the presumption is, that it was a *written* law. In *Robinson vs. Clifford*, (2nd Washington's Circ. Ct. Rep. p. 1.) where the deposition of a Captain, stating that, according to the law of St. Christopher's, no other vessel could have been permitted to bring away the cargo, was offered, Judge Washington said, that

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"the statute or written law of foreign countries, should be proved by the law itself, as written. The common, customary, or unwritten law, may be proved by witnesses acquainted with the law. In this case it does not appear whether the law alluded to by the witness was written or unwritten. *From the very nature of it, I presume it to be the former.*" (p. 2.) *In Seton vs. The Delavare Insurance Co.* (id. p. 175,) where a witness was offered to prove that the exportation of specie from Cuba was prohibited, the Court rejected the evidence, and said, that as this was a subject of purely municipal arrangement, "the law *must be presumed to be written,* and therefore it should be produced; or evidence given to prove that it was not in the party's power to obtain a certified copy of it; in which case inferiour evidence might be received." (p. 176.) These cases are in point; and the *presumption* must be that the law was written. The defendant has not shewn that evidence of this law could not have been obtained. In fact, the law could have been procured. From what has taken place in the last three or four years, we know that there are laws in China respecting the trade in opium: they have been published; and it is as possible to ascertain the custom-house laws of China as those of Cuba.

[See *post*, note on p. 54.]

Defendant's argument on first point of evidence. October 14th.

But, 2nd: The statement of the witness is not direct and positive, nor in answer to a direct question. Being asked why the kumshaw on opium was greater than that on salt-petre, he answers that question, and adds, *that so far as he knew,* both trades were

equally illegal. So vague a statement, from the Captain of a ship, upon a point of *law* demanding nice discrimination and the utmost certainty, is good for nothing. Oct. Sessions, 1843.

FOR THE DEFENDANT, it was said: The principle settled in the cases is, that if the law of a foreign country is shewn to be in writing, or cannot but be so presumed, the written law must be produced. But all the cases that have hitherto occurred, and have been referred to, were of civilized nations known to have laws, and laws which may be procured. But here is a country unlike every other on the face of the earth. If it may be called civilized, its civilization is entirely its own. Secrecy marks every thing relating to its concerns, and, especially, every thing relating to its Court. You cannot know of what nature is the law; whether it is common law, statute, or something differing from both. The rules and presumptions of evidence must have regard to the state and institutions of the particular country, and the actual state of knowledge respecting it; of which the Court will take notice. In the *Cherokee case*, (5th Peters's Rep. p. 1.) the Supreme Court of the United States took notice of the peculiar, *sui generis* character of the Indian tribes; and, in like manner, the Court, in this case, will regard the isolation and other peculiarities of China. In respect to the laws of such a nation the Court cannot know judicially what is the medium of proof; or, if it will take judicial notice of what it is, will also take notice, as an inseparable part of the same

Defendant's argument on first point of evidence. October 14th.

Oct. Sessions, 1843.

subject, of the impossibility of obtaining that proof. In *Consequa vs. Lauderbrun*, (1st Washington's Circ. Ct. Rep. p. 521.) Judge Washington admitted parol evidence of the customary interest, in China, of 12 *per cent.*

Defendant's argument on first point of evidence. October 14th.

But besides the peculiarity of the nation concerned in the present case, it is no universal principle that the commercial law of foreign countries is presumed to be written. In *Livingston & al. vs. The Maryland Insurance Co.* (6th Cranch's Rep. p. 274,) parol evidence of the laws of Spain in relation to the trade of Peru, having been rejected by the Judge below, the Supreme Court held the rejection to be errour. "It is the opinion of the Court," said Chief Justice Marshall, "that as the laws and regulations by which this trade was regulated, are not proved to have been in writing, as publick edicts, but may have depended on instructions to the governour, they may be proved by parol." (p. 280.) This case was acted upon by the Supreme Court of Pennsylvania in *Dougherty vs. Snyder* (15th Sergeant and Rawle's Rep. p. 84.); and the Court there said that as foreign laws were usually difficult of proof, and proof by authenticated copies would be very expensive, it shall "reasonably fall on the party objecting to the parol proof, to shew that the law was a written edict of the country. Reason and publick convenience, the just administration of the law, require this."...." *There can be no difference whether it be a law regulating trade or a law on any other subject:* the rule, from its nature, is universal." (p. 87.)

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If, then, parol evidence be admissible we have enough. The witness was Captain of an East Indiaman; a person to whom vast interests are intrusted. Such an officer must be presumed to be a person of intelligence. He must, himself, be acquainted with the laws of the port to which he trades. *He has a high interest to know them;* and when he states, as a matter of fact, that no trade could be had in opium, the presumption must be that it is so. We can, in regard to China, have no evidence from jurisconsults. The witness, under any exposition of his testimony, speaks to the whole extent of his knowledge: it is unlawful so far as he knows; and being a person who must know, the expression is tantamount to an affirmation of illegality. But the answer shews that the expression, "so far as I know," refers to the trade in salt-petre, to which the inquiry was directed. "*The trade in salt-petre is unlawful so far as I know,*—as well as that in opium." The trade in opium, he assumes to be so; and knows to be so: the trade in salt-petre is equally unlawful, *so far* as he knows. Perfect knowledge in regard to opium is clearly avowed by the answer, whatever may be the character of his knowledge with regard to the salt-petre.

Defendant's argument on first point of evidence. October 14th.

Baldwin J. If the witness had stated, positively, what the law was, the Court would have been inclined to admit the evidence; for it is true that, to a certain extent, the rules upon this subject must subserve the practical necessities of mankind. China is a country with which, as yet, we have had no

The Court's Opinion. October 15th.

Oct. Sessions, 1843.

treaties nor any diplomatick intercourse; and nearly all that we know of its government, laws and institutions, is derived from the relations of merchants, missionaries, and other persons who have been there. It would be too much, in the late or even in the present condition of that country,* to require a party to produce certified copies of its statutes. The nation, it is well known, is isolated and peculiar; and we know of no way in which access could be had to its records. These are facts which, in a case so notorious, the Court will judicially notice. Had the statement of the witness, therefore, been direct, responsive and full, we should have received his testimony, as an exception to a rule of law whose obligation, in most cases, is admitted. But it would be as an exception; and coming in on that ground, the testimony should be marked by nothing unprecise or imperfect. The witness in this case, however, does

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* Allusion is here made to well known events of the day. In March 1839, The Celestial Court issued an edict by which, after reciting that notwithstanding the prohibitions formerly enacted against the importation of opium, the drug was still smuggled by thousands of boxes into the various ports of China, it declares that the wrath of the great emperour had become "fearfully aroused," and would not rest until the evil was "utterly extirpated." Extreme penalties were then declared against every man who attempted to get it into the empire: And the final result was, that the Chinese government seized and destroyed all the opium on which it could lay hand, and put the British residents and officers of trade into prison. War having been declared against China by Great Britain, the Chinese were entirely conquered; and a treaty of peace was concluded in August 1842, between the Chinese and Great Britain, by which the former agreed to open five of their principal ports to British commerce; to allow consuls to reside in them; to conduct all correspondence between the two nations on terms of perfect equality, and to cede the island of Hong-Kong in perpetuity to the British nation. These events were generally regarded as likely to work a revolution in the intercourse of other nations with China; and the subject having been recommended to the attention of Congress, "an act providing the means of future intercourse between the United States and the government of China," was passed, March 3rd, 1843, by which, means were placed at the disposal of the President of the United States, to enable him to establish the future commercial relations between this country and the Chinese empire, on terms of national equal reciprocity. In pursuance of the power given by this act, President Tyler, shortly after its passage, appointed Mr. Caleb Cushing minister to China: and that gentleman departed on his new embassy in August of the same year: but when this case was tried, intelligence had not been received of his arrival in China.

not state, either directly or by clear inference, that to his knowledge the trade in opium is illegal. His answer is ambiguous, and an adjection to an answer rather than any answer itself; and withal, is but vague. Such evidence will not do; and on this ground alone, we order the answer to be stricken from the deposition.

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Evidence excluded.

Second Point of Evidence.

In the further progress of the trial, a person who was the legatee of a watch under Captain Phillips' will, was called by the defendants as a witness. The legacy had been paid in August 1836; and this suit was brought to October 1835. It appeared by the accounts of the executors, that Phillips' estate was INSUFFICIENT to pay the claim in this suit, should it be recovered; and the plaintiff therefore objected to the competency of the witness, on the ground of interest.

STATEMENT.

Against the admission it was said:—The witness is interested to defeat this action; for in the event of a recovery, he may at once be compelled to *refund* the legacy. FIRST: The executors may compel him to refund by bill in equity. In *Nelthrop vs. Hill*, (1st Cas. in Chan. p. 135,) it is said, that "if the executors pay out the assets in legacies, and, afterwards, debts appear of which they had no notice before the legacies paid, the executors, by a bill

2nd point of evidence. Against the admission. October 15th.

Oct. Sessions, 1843.

here, might force the legatees to refund." (p. 136.) On this point the counsel cited, likewise, *Burnley vs. Lambert*, (1st Washington's Rep. pp. 308, 312;) *Bower vs. Glendening*, (4th Munford's Rep. pp. 219, 221;) *Gallego vs. Atty. Genl.* (3rd Leigh's Rep. p. 49.) And as the executors have no right to recover till this or some other claim large enough to exhaust the whole estate is judicially proved to exist, the statute of limitation has not yet begun to run. An executor is not bound to notice every idle claim. He must be satisfied, in his own mind, or by a judgment, or decree, of the existence of the debt.

2nd point of evidence. Against the admission. October 15th.

SECOND: The creditors likewise, after establishing the debt at law, may, by bill in equity, compel the legatee to refund; *Burnley vs. Lambert*, (already cited;) *Milligan vs. Milledge & ux.* (3rd Cranch's Rep. pp. 220, 228;) *Dunn vs. Amey*, (1st Leigh's Rep. pp. 465, 472,) *Anon.* (1st Vernon's Rep. p. 162;) *Newman vs. Bacton*, (2nd id. p. 205;) *Gillespie vs. Alexander*, (3rd Russell's Chan. Rep. pp. 130, 136.) In *Clarke & al. vs. Gannon*, (Ryan & Moody's Rep. p. 31,) a paid legatee was admitted only because, under the circumstances, it could not be inferred that the estate was insufficient.

2nd point of evidence. For the admission. October 15th.

It was said CONTRA:—*This was a voluntary payment, with notice of an outstanding claim; for the bringing of a suit is notice.* The case of *Nelthrop vs. Hill*, cited from the "Cases in Chancery," and on which all the subsequent decisions and dicta are grounded, is therefore, rather an authority for us than otherwise. Notice having been given, that

case, by its very terms, excludes the case now before the Court. Oct. Sessions, 1843.

In addition, from the absence of a Court of Chancery, there is no method, in Pennsylvania, by which the *creditor* could pursue the legatee. But if either creditors or executors could have *ever* had a right to bring back the legacy, the right has been barred by *lapse of time*. By analogy to the acts of limitation the time elapsed here is more than sufficient to bar an action, at common law, by the executor, and more than sufficient to discharge lands from liability to creditors. If the claim upon the legatee is barred by lapse of time, then, on the authority of *Ludlow vs. The Union Ins. Co.* (2nd Sergeant and Rawle's Rep. pp. 119, 132,) he is competent.

2nd point of evidence. For the admission. October 15th.

BALDWIN, J. The present suit was pending when the legacy was paid: the claim was therefore fully known; and as there was no refunding bond taken, nor promise required, nor condition made, it is a voluntary payment, and the executor cannot recover it back. We question whether, under the law of Pennsylvania, a recovery could be had by a creditor against the legatee: the claim would be against the executor. But if there were a legal method of recovery, it must be considered that the lapse of time, (now seven years,) has created a bar. Lands of a decedent, which, in Pennsylvania, are chattels for the payment of debts, would be discharged from the lien in favour of creditors; and chattels, after so long a time cannot be considered as liable even in equity.

COURT'S OPINION on the 2nd point of evidence. October 15th.

Oct. Sessions, 1843.

This case we can hardly regard as within the principle of those cases of *fraud*, where the limitation begins only from the time that the fraud is discovered. The institution of a suit was clear notice not to pay. Let the witness be admitted.

Evidence received.

The questions of evidence having been settled, the defence to the main question rested, chiefly, on two points.

First: That by the *usage of the opium-trade* the kumshaws belonged to the Captain.

Second: That an *account had been settled* with Captain Phillips by the plaintiff's agent, Mr. Latimer, in 1831, in which the kumshaws were treated as belonging to Phillips, and that *this account had not been objected to by the plaintiff until shortly before the bringing of this suit, which was brought in* 1835.

Statement resumed.

In respect to the usage, many witnesses were examined. It appeared that in the East a *present* is always made on concluding any considerable business, and that on the general Canton trade, the kumshaw is a present made by the hong merchant or broker to the Captain or supercargo, upon the completing of a sale. It is voluntary on the part of the hong. It consists, not of money, but of shawls, fine teas, &c. and *is always regarded as the perquisite and private profit of the person to whom it is made.* But the kumshaw in the *opium-trade* differs in some respects from that in the *ordinary Chinese*

trade. It is a *money-fee*, fixed in amount, and obligatory upon the purchaser. In this trade, no hong-merchant is employed; but the dealing is direct between the Captain and the smuggler. It appeared, likewise, that there was a liability to arrest and punishment by the Chinese government of persons engaged in smuggling opium; though, practically, the danger, at the time of these transactions, was not very considerable. With regard to the different opium ships at Canton, it seemed that as between the owner and the Captains, the right to the kumshaws was usually, though not always, matter of special agreement; and that in the British ships it was generally DIVIDED. In the *Levant*, which was the *only American ship which had been engaged* in the opium store-trade, the CAPTAIN RECEIVED THE WHOLE KUMSHAW.

Oct. Sessions, 1843.

Statement resumed.

The kumshaw is paid only when the opium is delivered to a purchaser or smuggler, and not when it is trans-shipped.

As to the plaintiff's RELINQUISHMENT of his right, and Mr. Latimer's having given the kumshaws to Captain Phillips, it appeared that Mr. Latimer (who, as has been already stated, was the plaintiff's general agent, and clothed with large discretionary powers) *settled an account with Phillips in* 1831, *in which the kumshaws were carried to the credit of Phillips;* and no objection nor dissent was expressed by the plaintiff until shortly before this suit was brought. There was also some other (not very clear) evidence to shew a rather more direct recognition by the plaintiff, of this settlement.

Oct. Sessions, 1843.

Statement resumed.

On the other hand, Mr. Latimer stated THAT HE DID NOT CONSIDER THE KUMSHAWS AS FALLING WITHIN HIS PROVINCE.

Argument. Oct. 17th, 18th, 19th, 20th & 21st.

After the case had been argued by Mr. GILPIN, (late Attorney General,) and Mr. C. INGERSOLL, for the plaintiff; and by Mr. MEREDITH and Mr. CADWALADER for the defendant, Mr. Justice BALDWIN charged the jury as follows:

The Charge. October 21st.

The relations between the parties, originally, were these: Phillips, as Captain, was, by law, the plaintiff's agent in navigating the ship and delivering the cargo. The Captain's compensation consisted of his wages and a privilege or right of tonnage, which had been allowed to him, and he was not entitled to any of the earnings of the ship or profits of the voyage.

Relations of ship-owner and Captain.

Subsequently, however, the relations of the parties were changed. By the arrangements of Mr. Latimer, the ship and Captain were employed in a new and different way. As a store-ship, she became a store-house. Phillips became a store-keeper, intrusted with the keeping of opium in store, and the delivery of it upon the owner's orders; and responsible for losses of it by larceny or other ordinary causes. With duties differing from those of the Captain of a carrying vessel, his profit was lessened; for his tonnage, of course, ceased during this time. The storage went to the owner of the vessel.

As the employment of the Captain was a different one from that in which he was originally engaged,

and the duties new, it is clear that he was entitled to some compensation; and in the absence of all contract between the parties, we must inquire what rule results in law from the nature and circumstances of the case. Oct. Sessions, 1843.

This transaction having taken place in China, the local law, if there was any specifically applicable to the case, must, in the first instance, be looked to. If there was none, we must consider how the general principles of commercial law bear upon the facts of the occurrence. If there was a usage established and generally known among persons engaged in this trade, *that* becomes the rule to which the contract must be referred. And finally, the course of dealing between the parties, and the acts and admissions of themselves and their agents must have much weight in determining their respective rights. The Charge. October 21st. Relations of ship-owner and Captain.

Let us look at these in their order.

No local statute having been brought to the notice of the Court, we are referred to general principles of law and evidence, for the discovery of the intention of the parties, and the rights arising from them.

What then is this *kumshaw*, this five dollars, paid on the delivery of a chest of opium to a purchaser or smuggler? and to whom does it belong?

The owner of the ship is entitled to all the earnings of the ship. That which is claimed by and paid to the ship, in this trade, is the *storage*: this is paid for the use of the ship, and for the risk and ex-

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pense of keeping the opium. But the kumshaw is for something else. The owner of the opium is entitled to all that enters into the price of the *opium;* but there seems to be no pretence that the kumshaw is a part of this price. The consignee of the ship or of her outward cargo has nothing to do with the kumshaw: he is entitled to nothing but commissions upon what he receives for storage and sales. It is plain, too, that this kumshaw is not a charge made for the mere delivery of the opium, and due therefore to the hands on board the ship; for nothing is paid when the opium is transferred to another ship, though the trouble is as great as must attend its delivery to a smuggler.

The Charge. October 21st.

Relations of ship-owner and Captain.

For whose benefit, then, is the kumshaw paid?

When the Captain of a ship becomes a warehouse-man, he acts as consignee and not as Captain. As consignee he is entitled to some compensation.

Was this *kumshaw* considered as his compensation?

While the ship is engaged in its ordinary employment, the owner has a right to the time and services of the Captain to the extent of the duties of that officer's station. But if duties are undertaken not within the ordinary scope of the Captain's profession, but in a new, peculiar and unanticipated office, then the employer must pay a compensation; according to the value of the service, if usage has not fixed the rate of recompense; or according to established usage, if there be any.

Where the compensation of any agent is settled by contract, or, without contract, is fixed by usage, the jury, in the first instance, are not to inquire what the service was worth on a computation of the value of the time and labour, but they are to inquire into the fact of the existence of the contract or usage; and if they find neither, then they are to allow what is reasonable. Oct. Sessions, 1843.

On this point, (of the reasonable compensation,) you will judge. In the general trade it is admitted that the whole kumshaw goes to the Captain. In the opium trade the arrangement, in British ships, appears to have been to divide the kumshaw; while in the only case where a ship of the same nation as the one in question has been engaged in the opium trade, the Captain received the whole. The Scattergood took the place of that ship. You will judge, from the whole evidence, whether it is reasonable that she should succeed to the same rule of disposition of the kumshaws. The Charge. October 21st. Relations of ship-owner and Captain.

A contract may be inferred from usage. The usage of merchants constitutes the law of merchants: it is a rule of their own making and binds when no other law is applicable.

The influence of usage is universal. It attaches to nations and to individuals. It creates obligations. It interprets laws. In all governments, and in every community there are laws of usage and custom. Where a publick officer has compensation fixed by statute, though usage cannot alter the law, yet it is evidence of the construction given to the law, and The effect of usage stated.

Oct. Sessions, 1843.

is binding on past transactions. Publick officers may, by usage, be entitled to compensation for services beyond the line of their regular duty, and usage will regulate the amount of their compensation. General custom is a general law, and forms the law of contracts, and this, sometimes, though it be at variance with their terms. It controls even the principles of law. Thus the right to the way-going crop, days of grace and times of protest, are regulated by the usage of the place or bank, and affect even those who have no notice of the custom. The ancient, established, uniform and known custom of persons engaged in any trade makes a law for that trade, though it is not applicable to other trades. *It is their way of doing business.* It is the rule to which all who enter that trade, are understood to consent. It makes, supplies, and construes their contracts. We may here add, that known and settled usages ought to be respected by Courts and juries, unless such usages are against the laws or policy of the country: otherwise our dealings with foreigners in foreign lands will fall into disorder and confusion. And I may observe, that less evidence would be required to establish an usage in trading among distant, Eastern nations, where persons live far removed from the laws and customs of their own and other Christian countries, and yet can scarcely be expected to be governed by those of the people, *penitus orbe divisos*, among whom they are.

The Charge. October 21st.

Relations of ship-owner and Captain.

The effect of usage stated.

What then will make an usage illegal? Not the amount which may be regulated by it; for that depends on accident.

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You will then decide whether, at the time the Scattergood was employed as an opium ship, there was a known, settled usage as to who was entitled to the opium kumshaw. A legal USAGE is a thing which it is not easy to establish. The single case of the Levant is not, by any means, enough to make an usage; (nor, if there had been an usage, would casual instances of a different agreement on the British ships destroy it:) but if you think that there was, essentially, no difference between the opium-kumshaw and the kumshaw in the general trade, then, as there appears to have been an ancient, uninterrupted and general custom to give *these* to the Captain, such evidence of usage will be sufficient.

The Charge. October 21st.

The effect of usage stated.

If no usage is found, or if it is found that the rights of the parties in this case were not left dependant upon usage, we must refer to the course of dealing between the parties; for their accounts, acts, letters and declarations are competent evidence of the nature and terms of the tacit, understood, implied contract, under which they acted, and upon which they settled their mutual claims.

Agency.

The letter of attorney under which Mr. Latimer acted, gave him a discretion without reserving to the plaintiff a power to review or reverse acts done within that discretionary authority. The rule of all agencies, publick and private, is, that if authority is given to the agent to do specifick acts, and he exercise that power according to the right conferred; or, if a general authority is given to him to act in the premises according to his discretion, and

Oct. Sessions, 1843.

he do so act; the principal is bound as to the person with whom the agent deals, unless fraud is shewn.

If a power be conferred upon an agent, and yet be attended by private instructions as to the exercise of it, or restrictions not known to those with whom the agent deals, the principal is bound to the extent of the power which appears to be conferred.

The Charge. October 21st.

If a power has been assumed without warrant, by one professing to act as agent, the principal may ratify or annul acts done under such power, when informed of them. But he must adopt or reject the whole act: He has no right, without the consent of the other party, to adopt part of an act and reject part.

If the acts of an agent are partly within the authority given to him, and partly beyond it, they may be adopted by the principal so far as they are within the power, and disavowed as to the residue.

Agency.

But where a principal has a right to disavow an act done in his name, or on his account, he must do so within a reasonable time after he is made acquainted with it, and must give notice to the party to be affected: otherwise the law will presume an acquiescence; or the jury may infer it, according to circumstances.

If the facts are ascertained, the law makes the presumption. If contested or doubtful, the subject is referred to a jury, under the Court's direction.

These principles respecting agency apply to the present case. And if the account settled by Mr.

Latimer was within the powers given to him, or has been acquiesced in by the plaintiff, the principles already stated come into action. OCT. SESSIONS, 1843.

A settled account is, in general, binding: and to be otherwise, there should be shewn either fraud or palpable mistake. And, let me say, that this principle acquires new force when death has interposed to close a party's lips, and to deprive those who survive him of knowledge and means of defence. It is justly said, that there is a time for all things; which being suffered to pass, there should be an end of question. THE CHARGE. October 21st.

The Jury found for the Defendants. VERDICT. October 23rd.

[OCTOBER SESSIONS, 1835, NO. 10, COMMON-LAW DOCKET.]

FISHER VS. CARTER.

[ISLANDS.]

[MONUMENTAL AND TRADITIONARY EVIDENCE.]

At no time in the history of Pennsylvania, neither before October 13th 1760 nor since, have islands in her larger rivers been open to settlement on the same terms with fast-land generally. They could be settled only on *agreed* terms.

The Court speak of acts and monuments, and of judicial and professional *tradition* viewed as evidence; and, in the absence of more direct testimony, regard them as an authoritative means of ascertaining ancient opinion or fact.

OCT. SESSIONS, 1843.

STATEMENT.

At the junction of the Susquehanna and Juniata rivers in Pennsylvania, stands a very valuable ISLAND called, sometimes, Baskin's or M'Elcar's island, and sometimes Duncan's island;—the subject of the present ejectment. The plaintiff shewed title by *residence, improvement and cultivation* from 1749 to 1802. In the year last named, the Penns, being indebted to Thomas Duncan, Esquire, (subsequently one of the Justices of the Supreme Court of Pennsylvania,) for professional services, conveyed this island to that gentleman. These services, *the value of which did not exactly appear*, were the principal consideration of the conveyance. The DEFENCE was, that admitting the plaintiff's ability to recover on *other* grounds,* yet that islands in the great rivers of Pennsylvania had never been open to settlement on

* It is clear that the plaintiff could not, in any event, have recovered; his title being but *equitable*.

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what are called *common terms;* the terms on which lands in general were settled, and by which the plaintiff claimed title in this case. The PLAINTIFF admitted that *after October* 1760, (when, as will hereafter appear, the proprietaries took possession of a large amount of this sort of property,) islands were not thus open to settlement; but contended that *prior to that time* they were. And this point it was which was in issue in the case.

Statement.

It is here necessary to present a view of the juridical history of this subject.

*Carson v. Blazer, 2nd Binney, 475; decided in 1810.

In one case* the Supreme Court of Pennsylvania decided that the great navigable *rivers* of the state were never the subject of riparian ownership, but belonged to the *commonwealth.* In his opinion in that case, CHIEF JUSTICE TILGHMAN, speaking of the proprietary, said: "No doubt he retained the entire right of the river and *of every thing in the river,* in order that he might make such use of it as would be most conducive to the publick benefit. (p. 476.)

† Hunter v. Howard, 10th Sergeant and Rawle, 243, 245; decided in 1823.

In another case† (not absolutely requiring such a dictum) Mr. Justice Duncan, delivering the opinion of the Court, (the Chief Justice being absent,) said, that "*islands* in the great rivers of Pennsylvania, under the provincial government, were never the subjects of appropriation either by office right or settlement. *The proprietaries appropriated them to their own use by special warrants.*" And afterwards: "Thus, *from the first settlement of the country,* we see, these islands were withdrawn from appropriation." At the time when this sentiment was delivered, his

Honour was the owner of the island now in suit; and the question in controversy had, at that time, been agitated in regard to it. In a third case,* CHIEF JUSTICE TILGHMAN, giving the opinion of the Court upon a point respecting rivers, argued against one of the parties' rights, because if he had such rights in the river he "would have a right to the *islands* also, *contrary to universal opinion and practice.* These islands," continues the Chief Justice, "have never been open to applicants under the common terms of office either under the proprietary or state government; but have always been sold *on special contract*, and for higher prices;" and his Honour refers to the case of *Hunter vs. Howard*, last cited, "for a particular account of the manner in which islands have been granted." Chief Justice Tilghman, it is necessary to state, was born in the year 1756, and began the study of the law in the year 1772, in the office of Benjamin Chew, Esquire, then at the head of the profession and afterwards Chief Justice of Pennsylvania. His father removed from Maryland in 1762, and was, some time subsequently, appointed *secretary of the proprietary land-office;* a situation which he held with distinguished reputation for several years. Mr. Justice Duncan was born in 1760.

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STATEMENT.

*Shrunk v. The Schuyl. Nav. Co. 14th Sergeant and Rawle, 71, 79; decided in 1826.

It appeared, on the other hand, that the point now in issue had twice arisen in the inferiour courts of the state; but that the decisions there were in direct contrariety to each other. It had also been twice before the Supreme Court, but no opinion was given in either case; the point not being in issue in one case;† and in the other, (not reported,) where it was in issue, the Court not being able to agree.

†M'Elear v. Elliot, id. 242, 250.

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STATEMENT.

The evidence of documents from the land-office made it plain that *after October* 13th 1760, islands were not open to settlement on common terms; but it was not so clear from those records how the case had been *anteriour* to that date. The records did, however, shew that there was something like instances of the same course of general policy in regard to islands before that year as subsequently. For example: after October 13th 1760, the proprietaries would not allow an island to be returned on a warrant for fast-land. They exacted, for islands, a price much higher than for fast-land. They did not knowingly permit settlements to be made on islands, but regarded persons who made them as intruders. They gave leases under special restrictions, but did not regard such occupancy as giving a right to pre-emption.

After the revolution, the same course of policy with regard to islands was carefully continued by the commonwealth.*

*See the Act of 8th April 1785 §13, and of 6th March 1793.

While the course of policy respecting islands, *prior* to October 13th 1760, appeared from the evidence which follows:

1680, *June* 20th. A return of survey of a certain "island" in the Delaware. This paper was endorsed: "Island in the Delaware."

1684, *February* 2nd. A warrant to survey another certain "island," and certain meadow-land described. The endorsement, however, had no reference to any island, and was simply "The Meadows at" &c.

William Penn died in 1718; and the foregoing two were the only warrants for *islands* in his time. There was abundant evidence of his care to appropriate *manors*, or tenths of general surveys.

1754, August 29th. A letter from the secretary of the land-office to Lawrence Groden, *Esquire*, in which the secretary expresses his surprise that a certain person who, it appeared, kept forcible possession of another island in the Delaware river, *against the proprietaries' tenant*, could not be taken by the sheriff. "I should be sorry," says the secretary, in speaking of the sheriff, "to be obliged to complain against him to the governour; but I must do it if I cannot get process of court executed. However, let the writ be renewed every court, that it may appear how much he is in fault."

Statement.

1754, October 17th. The proprietaries having granted to two of their agents, a certain number of acres of good land, and well situated; an island, having, as appeared by the surveyor's draft, *two houses upon it*, was included in the survey; *but it did not appear by the caveat books, that any caveat was made by the persons named in the survey as settlers.* In 1770, a caveat by some persons claiming under a former warrant and improvement was dismissed.

1758, November 15th. A warrant requesting the surveyor to make a regular survey of a yet different island, that it might be leased "*on such terms as may be agreed on.*" Surveyed accordingly, "on the proprietaries' account."

1760, March 8th. A warrant reciting, that divers persons had presumed to destroy the timber and commit waste on another island (described) in

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the Susquehanna, and without any license from "us" had taken upon themselves to clear part of the said island; that the proprietaries were desirous to prevent such waste and spoil being made on the said island for the future, and that the same should be forthwith surveyed and returned "for our use." Warrant of survey accordingly.

1760, May 13th. A lease for three years, by the proprietaries, of an island in the Susquehanna, "surveyed and returned for the use of the said proprietaries." The tenant stipulates, in strict terms, that if he commit any waste, or if he assign the island or his lease without a license in writing from the proprietaries, his lease shall become utterly void.

Statement.

Then came the following warrant from the sons of Wm. Penn; and this document it was (the plaintiff contended) which first withdrew islands from general sale.

1760, October 13th. "Whereas during the life of our late honoured father, William Penn, Esquire, divers orders and warrants were given, &c. to survey or cause to be surveyed to and for his and our use and behoof, *the tenth part of all such lands as should be from time to time surveyed and laid out in the several counties of our province*:* And whereas, notwithstanding the said warrants and orders given as aforesaid, and our own repeated orders and warrants &c. since from time to time, THEY were not executed or observed as they ought to have been, (to our great loss and disappointment:) And we now judge it necessary to *revive* and *renew* THE SAID orders: These are therefore to authorize and re-

*These tenths composed what are known as Manors: Ante p. 73.

quire you, as soon as conveniently may be, to survey or cause to be surveyed for our proper use and behoof [the tenth part of the before referred to sort of land:] ☞ And that in *such future* surveys to be made, you take particular care to survey for our own use the several UNAPPROPRIATED ISLANDS in the rivers Delaware, Schuylkill and Susquehanna, and the several other rivers and creeks in our own said province, and make returns from time to time of the same premises into our secretary's office for our use agreeable to the *said* former AND this our renewed warrant and orders in that behalf."

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STATEMENT.

This warrant was endorsed "A warrant to survey for the proprietaries' use *all* the islands in the rivers Susquehanna, Schuylkill and Delaware:" and in pursuance of it, 88 islands were surveyed and returned between the years 1760 and 1770. The island now in controversy was among these, and surveyed November 13th 1760. *The surveyor's draft states that the island is called "Baskin's island," and notes the fact of there being a settlement upon it.*

It appeared, further, from the testimony of the deputy secretary of the land-office (who had been connected with that department for thirty-five years) that having been requested by the plaintiff to examine all papers respecting islands in order to give his deposition, he had carefully done so; *and that although many patents had issued for islands, he could not find one case where a patent had been founded upon actual settlement.* And again, that among the records of the land-office, but separate from its general concerns, are files called "proprietary files,"

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Statement.

which relate exclusively to the private estates of the Penns; and that *among these files he found*, when he came into the department, in 1809, *all papers*, with a single exception, *of whatsoever sort, which relate to islands*.

For the Plaintiff. November 2nd, 3rd, 4th, 7th & 8th.

Mr. J. Fisher (of Lewistown) and Mr. Randall for the Plaintiff: The point before the Court has never been decided; nor was it in issue in those cases where we find an expression of opinion from the bench. What has fallen from judges is explained by the fact that notice was not directed to the epoch which is now proved to be an important one. The number of islands granted prior to October 13th 1760, is comparatively small; for it is matter of common knowledge that the settlement of the state, at that early day, was only along the south-eastern part. Ever since October 13th 1760, or, in other words, since the only time that islands or their history have come to be subjects of notice, we admit what is said. Judges, when speaking on the subject, were speaking in a general way; and we ought not to seek for truth to a certain intent in every particular. It is plain that Chief Justice Tilghman and Judge Duncan cannot be regarded as speaking otherwise than in a general way. They cannot be taken as meaning to make themselves witnesses of a state of things which had passed away several years before either of them was born. They state, at best, what they derived from others; and these, in turn, may have rendered what they had learned but intermediately. How imperfect is such evidence! The *speaker* may have been unworthy of

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credit: he may have ill expressed himself; or the *hearer* may have ill conceived what was well expressed. In short, coming through the open channel of the human mind, all such tradition, even admitting the source to be pure, comes to us with the adulteration of imperfect conceptions, of weak motives; of fancies and foregone opinions; of oblivion and false remembrance, and of those varied springs of errour which must impart themselves to any such mode of transmitting truth. The dictum of Judge Duncan ought not to be cited at all. He could not have meant that his own dictum should decide his own cause.

For the Plaintiff. November 2nd, 3rd, 4th, 7th & 8th.

But all these, at any rate, were but obiter dicta: they possess naught of "the solidity of the judgment-seat." How do we find judicial opinion expressed when attention was directed to the point? In one case, the avoidance of any opinion. In two other cases, (inferiour Courts,) one Court is in direct opposition to the other: while on the first and only occasion that the point was in issue in the Supreme Court, there was a divided bench, and no opinion at all.

Is the defendant aided by the records from the land-office? We do not deny that the proprietaries could take possession of unappropriated islands prior to October 13th 1760; though, as we have said, few were so taken prior to that date. Nor do we deny that when once, in any manner, islands had been appropriated, they were subject to whatever terms of tenure or of disposition the proprietaries preferred. *But can one case be shewn where a person, settled on*

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an island prior to 13th October 1760, *with an intention of remaining there, was dispossessed because he had not made a special agreement for it?* The only case from which such a notion could possibly be induced, is that of the warrant of October 17th 1754. Now, there, the marks on the draft are the only evidence of settlement at all; and these were probably made by way of description and for the sake of identification. The settlement may have been abandoned; for no mention is made of occupancy. It may have been an Indian residence. It may have been no residence at all; and temporary in its very origin. It may have been made on behalf of the proprietaries. Who can say when, how, by whom or for what it was made? *Sixteen* years afterwards, to be sure, *some* caveat was dismissed; but how prosecuted, if prosecuted, or wherefore dismissed we know not. Besides, our occupancy began five years before this.

For the Plaintiff. November 2nd, 3rd, 4th, 7th & 8th.

The great warrant of October 13th 1760 did undoubtedly withdraw islands from common settlement. But it is a renewal of "SAID ORDERS." What orders? Orders to survey *islands?* Not at all; but to survey *tenths or manor lands.* "*They* (i. e. *those* orders) were not executed or observed as they ought to have been." All that relates to islands comes afterwards, and is adjectitious. It is a new and substantive order; and this is sufficiently manifest notwithstanding a careless expression towards the end of the warrant; by which a reference intended to apply to manor lands, is made to include islands likewise. It is manifest, we say; for, otherwise, the warrant of October 13th 1760, is made to recite that

William Penn had issued divers orders and warrants to appropriate *islands in general;* while the evidence shews that only two warrants were issued in his time about islands at all; both of them for single islands; *one of which islands, moreover, the return of survey treats just as it does fast-land.* Oct. Sessions, 1843.

For the Plaintiff. November 2nd, 3rd, 4th, 7th & 8th.

But the warrant is to survey UNAPPROPRIATED ISLANDS. The survey here did not follow the warrant; for the island was certainly *appropriated.* It was known as Baskin's island. The surveyor's draft thus calls it. So obvious was this appropriation that although the survey was made in 1760, no steps were ever taken to dispossess the settlers at all till 1802. The island was then transferred, not for money, (for the title was not marketable,) but in liquidation of certain professional services whose value don't appear. This fact shews that the Penns did, themselves, regard their title as, at least, *doubtful.* An island so valuable as this would not, otherwise, have been thus disposed of. Indeed, it is evident that the surveyor *misapprehended* his authority. His endorsement shews that he regarded his warrant as a direction to survey ALL islands.

After full argument on the other side, by Mr. M'CORMICK (of Harrisburgh) and Mr. MALLERY, the charge of the Court was delivered by

For the Defendant. November 4th, 6th & 7th.

BALDWIN, J. The case of *Carson vs. Blazer* goes far to decide by implication the one before us. It was there declared that the founder of our state, from motives of an enlarged publick policy, had reserved to himself the ownership of all the larger streams of the commonwealth;—the riparian owner coming

THE CHARGE. November 8th.

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but to low water mark. The river includes what is in the river, whether above the water or under it. And it is obvious that if any man might, at his pleasure, have taken possession of all the *islands* in a stream, he would have had it quite within his power to impede what we are told was the wise design of the proprietary owner.

The Charge. November 8th.

But we can scarcely regard the point as one which has been decided. Let it be examined, then, upon the grounds of historical evidence.

Thorough research has been made into the early records of the land-office; and the fidelity of counsel has presented to us every thing, probably, which can be gleaned from that field of inquiry. The evidence from those records is not, we may admit, of the most *direct* kind. It is not wholly irreconcilable with the notion that islands were open to settlement in 1749: but this is not the natural inference from it. On the contrary: though all islands were particularly taken into possession by the great warrant of 13th October 1760, and were thenceforth the subjects of peculiar and notorious regard, yet we do not discern any striking change in any matter connected with the disposal of them. Nay, so far as we can compare the history of that sort of property before and after the 13th October 1760, we find that the general policy in regard to it has been always the same.

Then, there is this remarkable fact: that diligent search into all these records *does not* afford one precedent of an island granted upon common terms, though it *does* furnish to us many grants of islands.

Admit that what is thus stated is, in each instance, but negative evidence. The circumstance impairs not its strength; for the case is one where, under any hypothesis contrary to that which we assume, there could scarcely fail to be positive evidence: and in such a case negative evidence is as strong as any that can be conceived. In truth, it is negative in form merely, not in effect.

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In the third place, we have evidence in the external order or disposition of the papers relating to islands.

This sort of evidence, the evidence of acts and monuments, is justly deemed of a high order. Any mere assertion that such and such opinions were held, or that such and such facts existed, depends for its credibility upon a variety of circumstances. But an external fact, a course of outward action, performed in observance of an opinion or practice, and testifying to it, indicates a clearness and fixity of idea which can leave but little doubt of its existence. It would, to be sure, be more satisfactory could the defendant shew, affirmatively, that this disposition of things had existed from the beginning; for this would be nearly conclusive. But the presumption from the state of the papers at the earliest date to which we can reach is in his favour. They were found in their present position by the deputy secretary of the land office when he first came into the department; and no effort of the plaintiff's counsel has shewn when any change was made, or that there was, ever, a time when a different state of things from the present existed. Certainly we

Value of acts and monuments viewed as evidence.

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do know that a course of external practice no where more generally DESCENDS than in large state offices. The clerk, on his coming there, finds a practice prevailing: he is trained up in it: he follows it in his gradations upward; and when he is old he will not depart from it.

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Super-added to all this, are declarations from eminent lawyers of a past day, which accord with what has been already mentioned; and serve both to explain and to confirm it. To be sure, this Court is not disposed to regard with favour what an English reporter styles "circuit traditions;" but we are now inquiring what state of facts existed three generations ago; a date beyond that to which the law supposes human memory ever to reach. We are without living witnesses; and in this as in other questions relating to ancient things, what can we do but call to our aid the less perfect lights of tradition? In examining any ancient historical fact, if unable to procure testimony from persons who lived at the very epoch which is the subject of our inquiry, we endeavour to ascertain what has been said by intelligent persons living in the generation immediately or almost next. Such persons, we may grant, are liable to errour; but they are less so than any persons living in a subsequent generation: And we appeal to their declarations, not, of course, as to *decisions*, from which there can be no appeal, but as to credible WITNESSES, likely to be informed on the subjects about which they speak. The counsel of the plaintiff has argued against this sort of evidence from the imperfection of the channels through which

[Sir J. Burrow, Aslin v. Parkin. 2nd Burrow, 665, 667.]

Occasional necessity and value of traditionary evidence.

it comes to us. There would be force in such an argument were the distance great or the links of transmission numerous; but where, as in this case, the witness is separated from the time about which he speaks, only by a single generation, the channel is so short and close that truth may be supposed to reach us in almost the same purity wherewith it issued from the well-head. It is worth observing too, that the testimony here given is, not as to an *opinion*, but as to A FACT. In regard to the former, it is certainly true, as the plaintiff's counsel argues, that a witness transmits what he understood, or what he remembers, or what he conceives; and there may be great adulteration of truth while its outward shape and seeming is preserved; but the simplicity of notion involved in the existence or non-existence of A FACT, admits scarce any variation from truth but in the substitution of another and opposite fact; a matter not to be *presumed*.

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The declarations of the late Chief Justice Tilghman the Court regards as entitled to particular respect. It has been the just praise of that excellent magistrate that he delivered few dicta; and his statement of any fact, (much more of one about which he was so likely, from associations in youth, to be informed,) will receive from those who knew him high deference, even though the source of his information be not specially declared. Let it moreover be observed that the Chief Justice speaks, not only of what he himself thought, but also of that which had been *universal* opinion—and PRACTICE.

Indeed, for much of our law we are unable to shew any visible and now existing source. It is tradition

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attested by monuments; successive judges and sages of the law recording what themselves were taught; was attested by external facts, and was notorious to every one: all consentient in opinion, and so transmitting to the last that which was more perfectly known to the first. We do know, however, that many matters have been solemnly adjudged, of which there is no report; and many statutes have been passed of which there remains not now a record. These remarks apply particularly to the land tenures of Pennsylvania; in regard to which many principles are perfectly settled and have long been, touching whose origin it would probably pass research to discover so much as a dictum.

The Charge. November 8th.

Upon the whole, while the case does not offer the directest, most connected, and most conclusive testimony that could be desired, we yet possess STRONG LEADING FACTS on which to found opinion; and in regard to things which took place ninety-three years ago, what more ought you to expect? Land-marks remain to us: the connecting links, the cement, the filling up, may naturally have crumbled away in the lapse of a century. And it having passed into maxim, that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other side to have contradicted, we are of opinion that your verdict should be for the defendant.

Plaintiff called. November 8th.

The Jury were about to give their verdict, when the plaintiff asked leave and was allowed to suffer a non-suit.

[APRIL SESSIONS, 1840, NO 11, COMMON-LAW DOCKET.]

IN THE MATTER OF HALL'S DEPOSITION.

[PEDIGREE: HEARSAY.]

[PRESUMPTION OF DEATH.]

Presumption of death does not arise from the fact that a person who, twenty-two years ago was in "bad health," would, if now living, be eighty years old; not even although on recent inquiry his name was not known at the post-office of a large city, (his former residence,) nor inserted in its directory:—There being no evidence of the *sort nor degree* of bad health, nor of *inquiries having been made about him among his friends*, nor of his having ever *left* the place of *his former residence.*

The question whether or not declarations post litem motam are evidence in matters of pedigree, is largely examined on the authorities, English, American and Continental; and the Court declares, in opposition to rulings in this circuit temp. Washington, that they are not: but these rulings are not positively overthrown; the case going off on the point stated in the first paragraph.

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STATEMENT.

In ejectment the plaintiff claimed title through J. P. who was alleged to be heir at law of the original owner; and to prove the heirship, offered in evidence the deposition of one Zebulon Hall, *regularly taken* in New York, A. D. 1822, *in an ejectment then pending in this state, for other land by this same plaintiff against a different defendant, and where the fact in dispute was the heirship.* The evidence was offered not as a deposition, but as a declaration concerning pedigree.

As ground for the offer it was proved that when Hall's deposition was taken, in 1822, he was fifty-nine years old, and *in bad health;* that on recent in-

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quiry at the New York post-office, no person named Zebulon Hall was known there, and that the name was not found in any late New York directory.

Hall lived in New York when his deposition was taken.

Statement.

No evidence was given to shew the *nature nor the extent* of Hall's bad health; nor that his name had been in more *ancient* directories; nor that he had ever *left* New York; nor that prior to offering the deposition any inquiry had been made concerning *his friends or relatives*, or whether *they* knew any thing of his existence or death.

Argument in favour of the deposition.

For the evidence it was argued, that the BALANCE OF PROBABILITY preponderated in favour of Hall's death. He would, if alive, be 80 years old; an age to which but a small majority even of the persons who reach 50, ever attain. This was true of persons favoured by robust health. But here is a man whose health is bad. It is not necessary to inquire into the diagnosis of his case. "Bad health," means health that is likely soon to decay. We are thus asked to suppose, that a sickly, diseased man has reached an age which even the robust are rarely so strong as to be able to attain. A specifick danger is always to be regarded when there is a question as to a presumption of death. *Watson vs. King*, (1st Starkie's Rep. p. 97;) *Sillick vs. Booth*, (1st Younge & Collyer's Vice Chan. Rep. pp. 117, 120.) The case of ill health, and that of age also, is mentioned in the books. See *Webster vs. Birchmore*, (13th Vesey Jr's. Rep. p. 362,) where "a very bad state of health" was

a strong circumstance in accelerating a presumption of death; though, indeed, there were others in that case. In *Rex vs. Inhab. of Harborne*, (4th Nevile and Manning's Rep. pp. 341, 345,) Lord Denman asks: "Can there be the same presumption as to a party who is 100 and one who is 35; as to a party who was in good health when last heard of, and one who was proved to have then had a disorder upon him which was likely speedily to terminate in his death? It cannot be." The continental jurists speak the same language. Among several questions to be put by the judge before a decision involving a presumption of death, is this: "*Cujus esset ætatis ille absens? An is absens sui natura esset robusti vel debilis corporis?*" (*Menochius de Presumptionibus, Lib.* 6. *Pr.* 49.)

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Argument in favour of the deposition.

Then Hall's existence was unknown at a department which, by its duty and employment, is conversant with the names of all residents in its neighbourhood; nor is his name to be found among those where the residents of a city are oftener recorded than omitted.

Any one of these facts would afford a presumption of death. All four united afford a strong presumption.

Death being presumed, the declaration is clearly admissible in this circuit. This point was settled in *Boudereau vs. Montgomery*, (4th Washington's Circ. Ct. Rep. p. 186.) where, after full argument at the bar, and an able opinion from Judge Washington, depositions like the present were read to the jury. The

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same point had been ruled in *Banert vs. Day* (3rd Washington's Circ. Ct. Rep. p. 243;) and, as we may infer from that case, had been decided in *Hurst vs. Jones*, under the former organization of this Court. It is not at all necessary to inquire into the decisions of other Courts: OUR OWN PRACTICE IS SETTLED.

Argument in favour of the deposition.

BALDWIN J. Supposing Hall's death to be proven, the same question arises here as we find in *Boudereau vs. Montgomery*. That decision is one which I had occasion to consider a good deal in a suit which came before me a few years ago. I then felt reluctant to over-rule it: The same reluctance yet exists. I feel, that in the first place it is A PRECEDENT, and, yet more, that it is a precedent left to us by a judge of great learning, of the utmost patience, and largely endowed with that finest, rarest, last betrayed of the qualities of human intellect; I mean with good judgment. I can never dissent from my honoured predecessor, Judge WASHINGTON, without diffidence, and without feeling that in such a case he is likely to be right and I am likely to be wrong. Still, it is not in the nature of human minds to view every thing in the same way; and where great principles are concerned, it may be obligatory on each to give utterance to his opinion.

THE COURT'S OPINION.

Examines the cases in the 3rd circuit.

Before examining the state of the law as elsewhere existing, I will say a word as to the cases in this circuit. *Boudereau vs. Montgomery* was in affirmance of a former ruling reported in 3rd Wash. C. C. Rep. p. 243; the case, I mean, of *Banert vs. Day*. Like many of the cases in what are called Washington's

Circuit Court Reports, (a book printed from Judge Washington's notes never originally designed for the press,) this case is stated short and almost in the form of a syllabus; the grounds of the ruling and the arguments of counsel being wholly omitted. It appears only that the counsel who argued in favour of the depositions, relied on the case of *Hurst vs. Jones*, decided in this circuit under the organization of 1801–2. We cannot tell what view of that case was given to the Court; but I have been at some pains to learn what the case really was: and through the kindness of a friend am in possession of the original, contemporary MS. notes of the reporter of that Court, and also with the notes of one of the judges. Each is full; and both accord. I will state that case: it is an interesting one. [His Honour here stated the case, for a full report of which, see APPENDIX, p. iii.] It is obvious that *Hurst vs. Jones* was no precedent for *Banert vs. Day;* quite the contrary: and if this last case was ruled on the authority of the former decision, and *Boudereau vs. Montgomery*, in turn, settled upon the base of *Banert vs. Day*: then, that we might exclude the deposition here offered, without so much disturbing the precedents of the circuit as making them conform to the case by which they were meant to be guided, and from which they have diverged only through imperfect observation.

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THE COURT'S OPINION.

Examines the cases in the 3rd circuit.

It would appear, however, from the learned argument of Judge Washington, in *Boudereau vs. Montgomery*, (and, indeed, from his direct statement,) that the ruling in that case, conformed to what he deemed the prevailing temper of the American decisions,

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(as well as of the English prior to the Berkeley peerage case,) and to the better sort of principles in the law of evidence.

Let these be shortly examined.

The Court's Opinion.

The first English case recorded is that of *Spadwell vs.* ————, which arose before Chief Baron Reynolds, in 1730, where the declarations of an aunt as to pedigree were rejected because made after dispute had arisen. (4th Campbell's Rep. p. 410.) Thirty-six years afterwards came *Hayward vs. Firmin*, before Lord Camden, where the declarations of a mother as to her marriage, though made subsequently to the commencement of the suit, were received after objection taken and debate had. Judge Washington remarks that Lord Camden's decision, being later in point of time, over-rules that of C. B. Reynolds; and so truly it would do, but that it appears that the decision of C. B. Reynolds was not brought to the notice of Lord Camden, and, for aught that we can perceive, was unknown to him. (4th Campbell's Rep. p. 417.) Both cases are *Nisi Prius* decisions, and neither is very copiously reported: they cannot, I think, be taken as of much significance, nor as settling a great deal either way. In 1741, *The Duke of Athol vs. Wilding* occurred, (Strange's Rep. p. 1151,) where a special verdict given many years before against other defendants, was offered in evidence to prove pedigree. The Court (Wright J. dissenting) rejected it as being res inter alios acta, and because, for aught that appeared, the evidence on which the verdict was founded, could, itself, be procured. In that case the right to admit as declaration what was inadmissible as de-

Examines the English cases prior to July 4th 1776.

position was a refinement of ingenuity to which the talent of neither Court nor counsel was able to reach; and so the matter of post litem motam was not discussed. So far, however, as the decision is concerned, it is clearly against the offer made here. This case is supposed by some to have been over-ruled. The idea is founded on what occurs in Buller's Nisi Prius, where it is said: "Another case in which this exception (res inter alios acta) OUGHT not to be allowed, is, where the fact to be proven is such whereof hearsay and reputation are evidence; and therefore a special verdict between other parties stating a pedigree WOULD be evidence to prove a descent..... And of this opinion was Mr. Justice Wright, &c. which opinion is generally approved, though the determination by the rest of the Court was contrary: *perhaps founding themselves on the case of Sir William Clarges*, &c. &c." (p. 233, Lon. ed. 1793.) The case of Sir Wm. Clarges, which the author proceeds to state, would appear to me a very proper one for the judges on which to found themselves. It is to be observed that no case is referred to but the Duke of Athol's: no precedent nor any practice is cited to contradict that case: we are told simply that Wright's opinion "is generally approved." Opposed to this evidence of approval, we have, however, the experience of Baron Wood, who says in 1811, that it had been "the general rule," so far back as his experience and knowledge went, to reject declarations made post litem motam; and though his brother Graham had not become acquainted with any such rule in any book that ever came within his reading, and thought that if it were a rule at all, it was one confined to the breasts of a few particularly

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The Court's Opinion.

Examines the English cases prior to July 4th 1776.

(4th Campbell, 406.)

(Id. 407.)

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conversant with the business of Nisi Prius; we find Mr. Justice Lawrence declaring that in *his* experience and practice, "an experience of nearly FORTY years," whenever a witness admitted that what he was going to state, he had learned after the commencement of a controversy, his testimony had been uniformly rejected. With him agrees Mr. Justice Heath, who says: "In the course of my long experience, in all the circuits I have gone, I never heard till now of such evidence being receivable. When the objection that the declaration was post litem motam has been taken, it has been constantly acquiesced in;" and Lord Eldon, who tells us: "I have known no instance in which declarations post litem motam had been received;" and Lord Redesdale, who can take upon himself to say, that the practice of the western circuit was to reject such declarations; and that circuit, he remarks, was supposed by those who travelled it, to be more correct on subjects of evidence than any other.

The Court's Opinion.

(4th Campbell, 410.)

(id. 412.)

(id. 420.)

(id. 421.)

The first edition of Buller's Nisi Prius appeared in 1772; and the direct or indirect experience of some of the judges just cited reached near the time to which the author must be taken to refer. I therefore presume that the statement made in it, that the dissenting opinion of Wright J. was "generally approved," in opposition to a decision of the Court, must be taken as a misapprehension as to the precise extent of professional approbation. I may here add, what is not always remembered in citing Buller's Nisi Prius, that though the book bears on its title the name of Francis Buller, it was printed pretty

much from the note-book of Lord Chancellor Apsley, by whom it was published, and to whom it was originally inscribed. Several of its dicta have been over-ruled. No other case worthy of note occurs to me as having been decided prior to our declaration of independence.

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THE COURT'S OPINION.

In the year 1777 we have *Goodright ex dim. Stevens vs. Moss*, before the Earl of Mansfield; a case which Lord Eldon informs us that Lord Thurlow was "most studious to contradict." Mr. Justice Lawrence, referring to that case, says: "Notwithstanding what is said in *Goodright vs. Moss*, I cannot think that Lord Mansfield would have held that declarations in matters of pedigree, made after the controversy had arisen, ought to be submitted to the jury;" and Lord Eldon acceded to the case "as it has been *practised* and *acted* upon." For myself, I confess that it does appear to me to evolve the dry point which occurs in the case before us; but I think that it was a point which escaped inconsiderately, and only along with others which carried it through. Certainly it was one not necessary to be decided; and the question of lis mota was not taken nor argued either on the bench or at the bar.

Examines *Goodright vs Moss*, A.D.1777, Cowper, 591.

(4th Campbell, 420.)

(Id. 410.)

(13th Vesey, Jr. 514.)

Thus stood the law at the beginning of the present century. I may say that the precise question of lis mota does not seem to have been greatly agitated: that is, the books do not often speak of it; though it may have been discussed at Nisi Prius, on the circuits. I regard all that is recorded as not very decided one way or the other.

Examines the English cases after 1800.

With the beginning of this century we have much

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more perfect lights. In 1807 came *Whitelock vs. Baker*, (13th Vesey Jr's. Rep. pp. 511, 514;) a case not having, to be sure, any thing to do with pedigree, but yet stating some salutary rules by which Chancery is guided in the reception of evidence. It is in this case we find that expression of Lord Eldon's, which every one must have noted, that the statements should be "THE NATURAL EFFUSIONS" of a party. Two years further on we have a decision of Sir W. Grant at the Rolls. The question was as to the admissibility of a pedigree found among a lady's papers after death, and which she had made after doubts had arisen as to the descent. The evidence was rejected. *Edwards vs. Harvey*, (Cooper's Cases, pp. 39, 40.)* We now come in sequence to a case vastly more laboured, more important and more entirely conclusive than any which preceded it; which excited great interest; was argued by distinguished counsel, and on which we have a decision of the house of Lords after a full expression of opinion, only not unanimous, from ten very able judges; Mr. Justice Chambre, who had heard the argument, but was absent when the opinions were delivered, agreeing, in addition, with the majority.

The Court's Opinion.

Examines the English cases after 1800.

* This case was an application to Sir W. Grant for a new trial of an issue which he had directed and which had been once tried before Baron Graham, who had likewise rejected the evidence. Mr. Hubback, in his recent valuable work on "*The Evidence of Succession*" &c. remarks of the paper, that "it is not clear whether it was rejected upon the ground that it had been made after the doubts had arisen as to the pedigree, or because the person who made it had, herself, an interest in establishing the relationship," [p. 661.] And he notes the fact that in the Berkeley peerage case, decided only four years after this, Baron Graham disclaimed all knowledge of the rule of lis mota; and hence appears to doubt if the case of *Edwards vs. Harvey* is an authority on that subject. It is to be remarked, however, that though Cooper's report is deficient in fulness, the circumstance of *lis mota* does make a considerable figure in it; and as it is not at all necessary that Sir W. GRANT should have rejected the evidence for the same *reason* which may have most impressed Baron GRAHAM, we may perhaps regard Mr. Justice Baldwin's citation of the case, as not without good ground. *By the Reporter.*

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The BERKELEY PEERAGE CASE, decided in 1811, (4th Campbell's Rep. pp. 401, 422,) has settled the law in England on foundations not to be disturbed nor relaid. I need, therefore, not refer to subsequent cases otherwise than succinctly. *Rex vs. Cotton*, (3rd id. p. 444,) was ruled by a judge who did not sit in the Berkeley peerage case; but he agrees with it, and on principle. Another judge has gone yet further than either of these cases. In 1834 Baron Alderson ruled that less than the existence of actual controversy is enough; that in intendment of law, a controversy is moved whenever that state of facts arises on which the claim is founded; *Walker vs. Beauchamp*, (6th Carrington and Payne's Rep. p. 552 &c.) and rejected evidence accordingly. And though Lord Brougham did not go so far as this in *Monkton vs. The Atty. Genl.* (2nd Russell & Mylne's Rep. p. 147,) he did most clearly acknowledge the rule of the Berkeley peerage case. Observe his language: "One restriction, however, clearly must be imposed: the declarations must be ante litem motam. If there be lis mota, or any thing which has precisely the same effect upon a person's mind with litis contestatio, that person's declaration ceases to be admissible in evidence. It is no longer what Lord Eldon calls a natural effusion of the mind. It is subject to a strong suspicion that the party was in the act of making evidence for himself. If he be in such circumstances that what he says, is said, not because it is true, not because he believes it, but because he feels it to be profitable, or that it may hereafter become evidence for him or for those in whom he takes an interest after his death, it is excluded,

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both upon principle and upon the authority of the cases, and among others, of *Whitelock vs. Baker.*" There is nothing contradicting this authority in *Slaney vs. Wade,* (1st Mylne & Craig's Rep. p. 338,) nor in any other case known to me. What is to be regarded as a lis pendens, in the understanding of law, is a point about which some of the later cases are not consentient; but the principle of the Berkeley peerage case (the only principle in the question before me) I take to be ineradicably fixed, in England. This indeed Judge Washington admits; but says that *Whitelock vs. Baker* and *The Berkeley peerage case,* having been decided since our revolution, are not authorities; that the question must be, how has the point been understood in this country before and since that event? and remarks that as the Nisi Prius decisions referred to by the judges in the Berkeley peerage case (the decisions, I presume, of C. B. Reynolds and Lord Camden) were never in print, they could not have influenced the law in this country. This statement proceeds on a misapprehension of fact. Chief Baron Reynolds's decision, *excluding* evidence post litem motam, was in print, though I am not aware that the same thing is true of Lord Camden's *admitting* it. In Viner's Abridgment, the first edition of which was printed before 1776, (a book which, if we may infer from the number of American subscribers to the second edition, was very popular in this country,) we have the following passage, which occurs in speaking about a statement made by a certain woman as to the birth of a child: "Objection was made," says Viner, "that the declaration of this woman was not evidence, seeing it was

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The Court's Opinion.

&c. when there was a discourse about this matter; *but what this woman said soon after the birth* (the italicising is Viner's) *was allowed in evidence, when there was no prospect of a controversy;* Per Reynolds Ch. B. at Devon. Assizes, Lent 1731." (Viner's Abridgment, Tit. EVIDENCE. T. *b.* 91.)

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THE COURT'S OPINION.

But what, at all events, is the state of the decisions in this country prior to *Boudereau vs. Montgomery?* The oldest one known to me is in our own state; the case of *Strickland's lessee vs. Poole,* decided in 1765; a case which, remarkable to say, does not appear to have been remembered either by counsel or by the Court in *Boudereau vs. Montgomery.* That decision does make the absence of any controversy an element of the case in which hearsay is admissible. The report is thus: "To prove pedigree, evidence permitted to be given of hearsay a great while ago—before any dispute stirred." In *Hurst vs. Jones,* A. D. 1801, the Court evidently took a distinction between ante and post litem motam, and admitted the declaration because, as was declared, a controversy had NOT been raised. Coming nearer to the decision in question, we have an opinion of the Supreme Court of Connecticut, as delivered by Chief Justice Swift. Speaking of declarations concerning pedigree the Chief Justice says: "When they are made for the express purpose of being given in evidence on a question of pedigree, they will not be received. If a person were to take up a bible, and, having the idea that it was afterwards to be produced in evidence, were to write down, at once, the births and deaths of his children; such an entry would not be admissible." *Chapman vs. Chapman,*

Examines the American cases prior to *Boudereau vs. Montgomery.*

(1 Dallas, 14.)

(Appendix, iii.)

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(2nd Connecticut Rep. pp. 347, 349.) This case was not cited before Judge Washington; but certainly the distinction is stated, though I admit that it was not the point in issue.

The Court's Opinion.

Now, I know not of any decisions contradicting these. In the cases quoted by counsel before Judge Washington, the question of lis mota does not appear to have been agitated: they relate rather to the effect of verdicts between parties, privies, and strangers. Such are the cases, if I understand them, from Henning and Munford, and from Munford; while the additional references by the Court give us nothing very pertinent on the subject; and, indeed, are cited for their general language only. Two of them, the one from 1st Yeates, and that from 8th Johnson, assert only that in matters of pedigree, the rules of evidence are greatly relaxed; a doctrine not disputable: the other is from Swift's Law of Evidence, and, I presume, to the same general effect. We have, at all events, the opinion of that writer specifically declared to us from the bench. Judge Washington, with the candour natural to him, says, that he "had no opportunity of looking into the American cases." Had this opportunity been allowed, I cannot think, that even with the decisions to be found in 1821, when *Boudereau vs. Montgomery* was decided, he would have added, as he did: "But I am strongly inclined to think, from expressions to be met with in many of the state decisions, that the rule of post litem motam has *never been recognized* in the United States." (p. 190.)

Examines the American cases prior to *Boudereau vs. Montgomery.*

My limited reading suggests nothing from which

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I can infer that the main current of decisions since 1821, has gone in a course different from what it did prior to that date. In *Morgan vs. Purnell*, (4th Hawks's Rep. p. 95,) the Supreme Court of North Carolina went so far as to reject a deposition because it was not CLEAR that it was made ante litem motam. "It must appear," says one of the Justices, "that such declarations have not been made at a time or with a view to serve any particular purpose. In this case it does not appear *when* Mrs. M. told the witness that she and Mr. M. were married: it might have been, for aught that appears, before or after the commencement of this suit. For these reasons I cannot say that the judge erred in the rejection of this deposition."..... "It is necessary," says another member of the Court, "that they (st. declarations concerning pedigree) should have been made not only without any view of benefiting the person making them, but also without a view of benefiting any other; that they should have flowed from a desire only of speaking the truth, which all are presumed to have when there is no motive to declare the contrary. The person therefore who offers such declarations must shew that they were made under such circumstances: *it is a pre-requisite to their admissibility*..... The depositions must be rejected." The Chief Justice assenting, the judgment of the Court below, which had likewise rejected the depositions, was unanimously affirmed. This case went farther than I was disposed to do on a recent trial; though, indeed, the case just cited was not there brought before the Court; and there was, too, in that case another circumstance which on reflection occur-

THE COURT'S OPINION.

Examines the American cases subsequent to *Boudereau vs. Montgomery*.

(Ante, p. 39

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red to me:—that the fact of heirship was in dispute only incidentally; the main defence having been adverse possession. The North Carolina case, just quoted, was in 1825. It was affirmed, as of course, in 1837; the Court having moreover changed. *Dancy vs. Sugg*, (2nd Devereux and Battle's Rep. p. 515.)

The Court's Opinion.

But is not the question concluded in all inferiour Courts of the United States, by the decision of the Supreme Court in *Stein vs. Bowman?* made in 1839, (13th Peters's Rep. pp. 209, 220;) though I did not entirely agree with the majority of the Court on some other points, not important to be mentioned, of the opinion there delivered. After going through some of the errours assigned to the action of the District Court below, Mr. Justice M'Lean proceeds: "But there is another ground on which the opinion of the District Court can be sustained, and it is proper to state it. The declarations offered as evidence were made subsequent to the commencement of the controversy, and, in fact, after the suit was commenced. It would be extremely dangerous to receive hearsay declarations in evidence respecting any matter, after the controversy has commenced. This would enable a party, by ingenious contrivances, to manufacture evidence to sustain his cause. By interrogatories propounded in a cautious manner to unsuspecting individuals, he might elicit the answers he most desired. *It is therefore essential, when declarations are offered as evidence, that they should have been made before the controversy originated, and at a time and under circumstances when the person making them could have no motive to misrepresent*

Examines the American cases subsequent to *Boudereau vs. Montgomery.*

the facts." I have gone through all the cases on my notes or which memory suggests. There may be others, in the multiplication of modern books, which I do not recall; but I presume that they are not numerous. How then does the question appear to stand? In England we have opinions from Lords Eldon, Redesdale, Ellenborough, Brougham; from Chief Baron Mac Donald, Barons Wood and Alderson; from Sir William Grant, M. R. and from Justices Bayley, Lawrence, Heath, Chambre and Dampier. In our own Country, from the Supreme Court of the United States, the Supreme Court of Pennsylvania, the Supreme Court of Connecticut, the Supreme Court of North Carolina (twice) and from the Circuit Court of this circuit as organized in 1801–2; a Court which consisted of Chief Justice Tilghman of Pennsylvania, Justice Griffith of New Jersey (an able man,) and Justice Basset of Delaware. All these judges and Courts speak more or less fully, and ALL give it as their opinion that the declarations, to be admissible, must be before a controversy stirred.

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The Court's Opinion.

General view of the English and American cases.

The rule of the civil law is sufficiently known, and is thus given by Mascard, in his learned work "De Probationibus:" "Nec vero tantummodo debent esse personæ graves, sed etiam debent deponere se audivisse ea quæ asserunt, ante litem motam: quod si post litem motam deponerent, non solum non probarent, sed nec ullam fidem facerent; *quia facile contingere potest ut quispiam id audiverit ab alio, qui illud protulit in fraudem, vel quod lis ipsi mota traxerit istam famam.*" I am far from meaning to cite a civilian as authority; but in a question concerning the safety of a practical rule, the experi-

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ence of old and corrupter countries is a source of information not wholly without value.

The Court's Opinion.

It is not necessary to place this matter upon the technical ground that the case of *Boudereau vs. Montgomery* has been over-ruled by *Stein vs. Bowman*. I am willing to look at it with more comprehension. We do then certainly find a power of authority and of judicial declaration not to be resisted. If the doctrine could not stand on principle, no judge could sustain himself against so commanding a body of names. They embrace the great masters of law and of thought for more than fifty years together: I must bow to them.

Viewed on general principles.

It is scarcely needful that I say much as to general principles. They have been so fully discussed in the leading case quoted by me, that I will only refer to what is there said. I need not repeat it. I cannot improve it. Whomsoever the Berkeley peerage case leaves unconvinced I should not hope to satisfy. Necessity is the principal argument for admitting this sort of evidence. On this point only I will say, that this is a thing very easy to assume, whether it exist or not. I apprehend that if parties understand that they MUST bring purer evidence, the necessity will disappear; and if in a few cases the rule operates with severity upon individuals, it is in this, as in many other cases, only the sacrifice that is to be made to a greater and more general good.

My sincere respect for the learning and wisdom of Mr. Justice Washington, and the force with which on a former occasion (though before the decision in

Stein vs. Bowman) his ruling was pressed on me, have made me go thus at large into the subject. I need not, perhaps, have said so much; for the depositions in this case are inadmissible on another ground, and on that I prefer to decide the point:— There is no evidence that Hall is dead, or that his deposition could not be had in a more regular way.

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The Court's Opinion.

Boudereau vs. Montgomery, though greatly shaken, is not over-ruled.

The life of a person once shown to exist is intended to continue till the contrary is proved, or is to be presumed from the nature of the case. Direct proof is not here offered. Are the facts which are shown sufficient to supply its place? The witness, if alive, is eighty years old; an age that we may admit is an advanced one; but is yet one to which life is occasionally, nay, not unfrequently prolonged. The Court cannot, therefore, presume, as of course, that Hall has not reached it. Lord Hale has indeed said that it shall be presumed life will not EXCEED NINETY-NINE years; *Weale vs. Lower*, (Pollexfen's Rep. pp. 55, 67.) and it may be inferred that a man, if of any age already, will not live eighty years besides. *Napper vs. Sanders*, (Hutton's Rep. p. 118,) *Keeble's Case*, (Littleton's Rep. p. 370;) but Chief Baron Reynolds refused to presume a witness dead, who had been *examined* SIXTY years before; there having been no proper searches or inquiry made after him. *Benson vs. Olive*, (2nd Strange's Rep. p. 920.)

Presumption of death.

Neither does the circumstance that the witness was in bad health in 1822, infer, as necessary consequence, that he is now dead. The difficulty is here:—that the expression "bad health" is indeterminate. There are manifold sorts of bad health, and

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many degrees in most of them. Shew me that Hall was the subject of some quick consuming disease, or of any specifick malady at all, and you will change the case. Suppose that his bad health was temporary, or that the expression means only that his health was not robust. A man in bad health at one time may recover afterwards: that depends entirely upon the nature of his disorder, and mode of treatment, and the vigour of his constitution. And the valetudinarian often prolongs an existence beyond him who, in the carelessness of health, may be suddenly cut down. In the case cited from 13th Vesey, the health was "*very* bad," (the Chancellor speaks of it as "desperate,") and the man was to have been heard of in six months after he went away; several years before. The case from Nevile & Perry goes only to shew that the presumption of life or death is a question of fact entirely. With both cases I agree.

The Court's Opinion.

Is the case essentially changed by the inquiries made at the post-office? This difficulty occurs: that there is nothing to shew that Hall was a person *likely* to be known there; that he was in the habit of receiving letters, or that he was a person of any note or consequence. It is no presumption of law that the runners of the post-office know, so as to answer at first inquiry, the name and residence of every person in a populous city.

Remarks of a similar sort apply to the inference which would be drawn from the absence of the name from the directory. Indeed, in the insignificance of advanced old age, a man has generally ceased to make impression on the busy world, or to be enrolled in the register of its active concerns.

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It seems to me difficult to suppose that direct evidence cannot be given of a death which, if it has occurred, has occurred close to us, and since 1822. Or did Hall ever leave the place of his former residence? let this fact be shewn; and that his friends have not heard of him for seven years. Had he no friends? let that fact be shewn. *The difficulty is, that the plaintiff don't shew that he has made proper search or inquiry for Hall.* Had he done this, and been unable to hear any thing of the person, I should be of opinion to receive the testimony. But there is a meagerness about all this part of the case, which is unsatisfactory; to use no harsher adjective. It shuts up the access to presumption which would have otherwise been easy. The case is much like that of *Benson vs. Olive*, already referred to. In short I see nothing in any of the circumstances shewn, nor in all of them together, which, in the absence of proper inquiry, brings that weight and conclusiveness which ought to exist before you set aside a wise and deep-laid rule of law.

The Court's Opinion.

Evidence inadmissible.

ANONYMOUS.

[OPINION OF COUNSEL.]

[VOLUNTARY SETTLEMENT.]

The opinion of Counsel not in practice, and given in a case other than that before the Court, may, in the Court's discretion, be quoted at the bar; not as authority, in a technical sense, but as calculated to assist the Court in its researches and judgment.

A voluntary settlement in favour of an illegitimate child by a father in trade, and indebted, if clearly solvent at the time, is good against subsequent creditors; the settlement having been made without a fraudulent intent.

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Statement.

J. S. M. being the father of an *illegitimate* child by a former connexion, and now about to marry another woman, settled, in March 1833, *of his own suggestion*, $3000, personal estate, in trust for the child; himself retaining no interest in the property, which was transferred to the trustee and the possession of it surrendered. His whole estate, in round numbers, and beyond that settled, was $13000: *his debts* $1700: they were simple contract debts *not specially secured.* His marriage took place about a month afterwards. *He was in trade at the time of the settlement;* about half of his estate being thus invested. He continued essentially in this relation of debts, property and business up to January 1836; rather improving his concerns than otherwise; his debts frequently shifting, and all the persons who were creditors at the time of the settlement having been paid within nine

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months from the date of it. In that month he entered into a partnership, and by the advice of his partner, engaged in new and extensive speculations which proved disastrous. The concern having failed in July 1838, this suit was brought by a creditor whose debt arose November 10th 1837, to set aside the settlement as fraudulent against him.

Statement.

THE VALIDITY OF THE SETTLEMENT was accordingly THE POINT IN ISSUE.

Question of citation.

In the course of the argument, the defendant's counsel, having cited judicial authorities, offered to read a printed case and opinion upon it by Mr. Binney, of the Philadelphia bar, retired from practice. He said that it appeared to be an opinion drawn with more than usual care. This was opposed on the other side as irregular, but no authorities were cited against it. His Honour, remarking that such citation was not very common, desired to take till the following day to consider of it; when he gave an opinion as follows:

The Court.

It is clear that opinions of counsel cannot be considered as of authority in any strict sense of the word: but in this day when the limits of technical precedent have been a good deal broken down, they may be used by the Court, at its discretion, to assist its researches and judgment. Lord Holt, Lord Kenyon and Chief Justice Marshall, all of them men of strict minds, have severally referred to the statements of counsel made arguendo.* Lord Talbot in 1734, referring to a case decided by Lord Macclesfield, mentions it as a circumstance of weight that

*Fisher vs. Wigg, 1 Ld. Raymond, 622,631; Seagrove vs. Kirby, 6 Term. 483, 486; Sexton vs. Wheaton, 8 Wheaton, 229, 243.

"Mr. Vernon had always grumbled at the determination of that case, and never forgave it to Lord Macclesfield."* Subsequently, as appears from the Reports of Sir John Comyns, an opinion of Mr. Vernon was read before the barons of the exchequer, and appears to have been heard respectfully; since the reporter notes that the decree was "agreeable to this opinion."† In 1790 Lord Kenyon quoted an opinion of Mr. Fazakerley and D. Ryder, and spoke of it as containing as much good law as if it had the authority of all the judges in England.‡ The work called "Cases and Opinions" was cited more lately, both before Sir T. Plumer and Sir Lancelot Shadwell, Vice Chancelors;§ in the last instance by Sir Edward Sugden: and in another case, before V. C. Sir John Leach, a detached opinion of Serjeant Hill was quoted at the bar, and is given at large by the reporter.‖

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The Court.

*Jones v. Marsh, Cas. Temp. Talb. 64.

†St. Amand v. The Countess of Jersey, 1 Comyns, 255, 6.

‡Alpass v. Watkins, 8 Term, 516, 519.

§Simpson v. Gutteridge, 1 Maddock, 609, 616, or Am. ed. 1829, 327, 330. May v. Roper, 4 Simons, 360, 362.

‖Forth v. The Duke of Norfolk, 4 Maddock. 503, 504, or Am. ed. 1829, 266, 268.

In all these instances, however, with the exception of that in Comyns, (an exception which might be excused only in favour of so great an equity lawyer as Mr. Vernon,) the opinion was given on a case other than that before the Court, nor were the counsel in practice. I think that if opinions of this sort are cited, it should be under these limitations: and, of course, the reception of them at all is matter of discretion for the Court. It must be intended that the Court is as well instructed in the law as the majority of gentlemen at the bar. You may read the opinion; but give a copy of it to the other side.¶

Case with Opinion of Counsel read.

¶In accordance with the example of Mr. Maddock, the reporter has placed the Case and Opinion in a Note at the end of this report. See, *post*.

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In the argument of the PRINCIPAL SUBJECT, it was said,

Argument.

Against the settlement: that sustaining it would be without any foundation in precedent. The settlement is voluntary: it is made by a person in debt: the debts are wholly unsecured either by the settlement itself, or by any lien independent of it: the settler was in trade: his bounty is in favour of a bastard child: he himself has failed, and the party opposing it is a creditor. No case has gone so far as to support such a settlement. In *Holloway vs. Millard* (1st Maddock's Rep. p. 414, or Am. ed. 1829, 225,) though a mother's settlement was upheld in favour of her natural child, there was no debt, nor was the settler in trade. In *Battersbee vs. Farrington* (1st Swanston's Rep. p. 106,) the settler was not in debt, and the beneficiaries of the trust were a wife and children. *Sexton vs. Wheaton* (8th Wheaton's Rep. p. 229,) was without debt, and in favour of a wife.

Against the settlement.

And though in *Stephens vs. Olive* (2nd Brown's Chan. Cas. p. 90,) there were debts, yet it is made an important fact that they were secured by mortgage; and the settlement was in favour of a wife. Even in the case of C. F. R., on which counsel's opinion is quoted, (if such citation is to be answered,) existing debts were all secured, and the settler was neither in trade nor contemplating it. An examination of the cases subsequent to those here cited will prove, that although voluntary settlements have, at times, been sustained, they have never been settlements so surrounded with bad circumstances as this is.

If the specific debts which existed at the date of

this settlement, were yet unpaid, there is no doubt that the settlement could be set aside, *Reade vs. Livingston*, (3rd Johnson's Chan. Rep. pp. 481, 494.) The result ought not to be altered because the debts have shifted. There has been nothing beyond shifting. Payment there has been none. Creditors may have changed, but indebtedness has remained: and it carries along with it the original taint. Suppose that the existing creditors were the same persons as were creditors at the date of the settlement; holding mere *renewals* of their original debts;—renewals by successive notes, perhaps. Could not such creditors set aside this settlement?

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Argument.

The character of the beneficiary of this trust is an argument. The consideration arises *ex turpi causa*. It is uncleanly. To sustain it is to encourage licentiousness and, indeed, to "render adultery respectable." Throw upon every part of such vice not only the stain of disgrace, but also the sting of disability, and you do much to prevent it. The less that is done to elevate illegitimate children to the rank of those born in wedlock, the better certainly for the cause of morals.

Against the settlement.

Something was also argued from the settler's having been in trade; and reliance was had upon the remarks on this point of Judge Duncan in *Thompson vs. Dougherty* (12th Sergeant and Rawle's Rep. pp. 448, 457,) and of other Judges in different cases; not of sufficient moment to be recorded.

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BALDWIN J. I was inclined, on first view, to connect this settlement with the marriage; but though we may perceive in the proximity of the two, a motive for the settlement, there is not enough in the case to prove that the transaction was in consideration of marriage. It must, therefore, be considered as a voluntary settlement; and if sustained must be sustained on the principle that it was made under circumstances which do not impair its validity when so considered. And, in the first place, I take it to be now settled, that the fact of a conveyance being voluntary is not, *of itself*, enough to impair its validity. *Stephens vs. Olive* (2nd Brown's Chan. Cas. p. 90.) *Battersbee vs. Farrington* (1st Swanston's Rep. p. 106.) *Sexton vs. Wheaton* (8th Wheaton's Rep. p. 229.) Points less settled in this country are those which arise from (1) the party's having been somewhat indebted at the time; (2) his having been in trade, and (3) from the beneficiary of the trust being a bastard child.

The Court's Opinion.

Let these matters be examined.

The whole doctrine on the subject of voluntary settlements rests, I take it, on this principle: that a man being the absolute owner of what is his own, may do with it what he pleases, provided he does not injure the existing or expected rights of others. And hence with regard to debts created subsequently to the settlement, the matter must generally resolve itself into a question of fraudulent intent: This fact or that fact is accordingly unimportant except in so far as it bears upon this question of design.

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The common law being a system built up as cases arise which it is to settle, its principles are developed in so close connexion with facts, that we are apt to mistake for essential that which is but accident. Thus, advancing a step beyond first principles, cases say that a settlement by one indebted is good provided there be provision in it, or otherwise, for existing debts: *Stephens vs. Olive* (2nd Brown's Ch. Cas. pp. 90, 92;) *George vs. Milbanke* (9th Vesey Jr's Rep. p. 194:) Others rely on the fact that the settler was not in trade, *Holloway vs. Millard* (1st Maddock's Rep. p. 419, or Am. ed. 1829, 228:) Others that the whole of the estate was or was not settled: Others that debts were or were not contracted immediately after the settlement, *Walker vs. Burrows* (1st Atkyns p. 93,) and others upon facts of different sorts which I need not particularize. But in no case at all fully reported, (no case at least that I have been able to find,) are these facts relied on *as* facts, or otherwise than as shewing the *intuitus*. In this point of view they are indeed often significant:— as, for example, if a man settling his estate, provide effectually for all existing creditors; the presumption of fraud on those creditors, which, without such provision, would be violent, is repelled. As, on the other hand, if, having embarked all his estate in the risks of commerce, he privately withdraw it, and yet trade as he did before, and fail; or, if he put the *whole* of his estate, by settlement, into the keeping of others, and so "subject himself to his cradle;" or, if, immediately after a settlement, he contract large debts with persons whom he knows to be ignorant of what he has done, and who may have been deal-

The Court's Opinion.

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ing and deceived by a belief of his means: in these, and in many cases which might be put, a natural or even a violent presumption of fraud arises. It is however but a presumption, and as such, liable to be overcome by facts which control and break it down.

The Court's Opinion.

[His Honour then examined the facts of the case, as already presented, and ended in a conclusion that actual fraud could not be presumed from them.] On the contrary, the motive of the settlement seems to have been a good one. The party was father to a bastard child. In this he had undoubtedly been guilty of an act both sinful and shameful. He was about to form a new and "honourable" connexion; but his former course of living had fastened upon him obligations easy to be perceived, and permanent both on his feelings and providing care; obligations which were all the more coercive over *him* because they would be rejected by every one besides. What then was more decent, or more according to the suggestions of an enlightened conscience or a refined mind, than to make some arrangement by which this offspring of a strumpet's bed should not become a charge upon her whom he was about to make the wife of his bosom?

There may, however, yet be some rule or principle of law which, superiour to the settler's intent, subverts his act.

Thus, it is urged that the party was in debt at the time, and that the taint of this indebtedness was not destroyed by specific securities as in *Stephens*

vs. Olive. But if you are unembarrassed by the debt, considered as an evidence of fraud, (and as such we have already considered and disposed of it,) its effect, I think, is destroyed. Mr. M. was clearly solvent in the spring of 1833: that is enough. His debts, it is true, were not secured by specific pledge; but certainly they were secured; of which the best evidence is, that they have all, long ago, been paid. Oct. Sessions, 1843.

In reply to this it is argued, that although creditors have changed, indebtedness has remained; an argument which, in connexion with the facts of the present case, is rather specious than solid. Suppose, that just before the settlement, and with a view to it, Mr. M. had run off $1700 of his property, and with the proceeds paid those debts which he then owed, or that he had transferred the property itself in satisfaction of those debts: it will be admitted that, on this score of indebtedness, the settlement would be free from objection. Yet he would only have credited one account by debiting another; discharging debts, but reducing assets in exactly the same amount. He might have gone into debt again, in the same hour in which he made the settlement; purchasing or taking back the same property, perhaps; and, may be, from the same person to whom he had transferred it, and for the same price, and the identical moneys. A matter so purely formal as this would be, a mere transposition of items in account, cannot be important in itself; nor important at all, except as evidence of fraud; a point of view in which we are not, here, considering it. Solvency, it must therefore be, which is of the essence of The Court's Opinion.

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the inquiry, and so are the authorities. *Lush vs. Williamson*, (5th Vesey Jr's. Rep. pp. 384, 387;) *Jacks vs. Tunno* (3rd De Saussure's Rep. pp. 1, 5;) *Salmon vs. Bennet*, (1st Connecticut Rep pp. 525, 548;) *Sexton vs. Wheaton*, (8th Wheaton's Rep. pp. 229, 248;) *Hopkirk vs. Randolph*, (2nd Brockenbrough's Rep. p. 132;) *Van Wyck vs. Seward*, (6th Paige's Chan. Rep. pp. 62, 68;) and see also *Huston vs. Cantril*, (11th Leigh's Rep. pp. 136, 159.)

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The argument derived from publick morals, savours too much of severity. Would it not force us to avoid the contracts of these unfortunate persons? to place them under every disability? and to reduce them at once to the state of the ancient excommunicate? All their senses have but human conditions; and it is enough to leave upon them that stain of their birth, which neither their own innocence, nor a life of virtue, nor the compassion of society, nor any earthly law hath power to take away. Indeed, it would be quite as much against publick policy, in one way, to relieve a man against acts done according to his duty, as, in another way, it can be against that policy to sustain them. And a conscisir Peter King. encious chancellor, in over-ruling the hard decree Lord Cowper, (Prec.in Ch.475.) of one of his predecessors, said properly enough, that it is both reason and justice that a father provide for an innocent child, whom he has occasioned to be brought into the world in this shameful manner. *Marchioness of Annandale vs. Harris*, (2nd Peere Williams's Rep. pp. 432, 433.) This sentiment is confirmed by other judges: "God forbid," said Chancellor De Saussure, "that I should lend the sanction of the Court to any thing which would

shake or loosen those great moral ties which bind society together; but we must not permit our feelings and apprehensions to mislead our judgment. Although it is morally as well as legally improper to have illegitimate children, the law not only permits, but enjoins it on the father to maintain the illegitimate child: the immorality is in the act, not in the provision;" *Harten vs. Gibson* (4th De Saussure's Rep. pp. 139, 142:) And see *Williamson vs. Codrington* (1st Vesey's Rep. pp. 511, 514;) *Holloway vs. Millard* (1st Maddock's Rep. pp. 414, 419, or Am. ed. 1829, pp. 225, 227;) *Knye vs. Moore* (1st Simons & Stuart's Rep. pp. 61, 64;) *Bunn vs. Winthrop* (1st Johnson's Chan. Rep. pp. 329, 338;) Also, *Pratt vs. Flamer* (5th Harris & Johnson's Rep. pp. 10, 20;) and 4th Kent's Com. pp. 216, 217.

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The Court's Opinion.

Finally, as to the settler's being in trade. Why shall this fact, as of any essential and inherent malignity, destroy the settlement? As proving a liableness to failure, and thence as indicating *intent* or inferring *fraud*, the force of such a fact is sometimes considerable: but the question of fraudulent intent has been disposed of. No doubt at all, these settlements are made to guard against failure;—failure, not as certain, nor as expected, nor even as probable; but yet as within the chances of human life. And, such being the fact, there seems to be no good reason why such arrangements, if allowable to those who do not require them, should be disallowed if made by persons who, from the vicissitudes of their profession, peculiarly need them. No settlement has been upturned purely because the person making it was in trade: and there are cases which have

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been sustained where the settler was either in trade or contemplated it; *Sexton vs. Wheaton* (8th Wheaton's Rep. p. 229;) *Battersbee vs. Farrington* (1st Swanston's Rep. pp. 106, 110;) *Jacks vs. Tunno* (3rd De Saussure's Rep. p. 1.)

The Court's Opinion.

Arguments are occasionally found against these settlements altogether; (Atherly's Treatise, pp. 230, 237;) and it is sometimes said that they are at variance with our republican manners and institutions. But I doubt whether these arguments have been well considered, or whether they would be confirmed by practical observation. If made in rightful subordination to the claims of others, at a proper time, with due reference to the amount of property unsettled, and, generally, under circumstances otherwise allowable, I confess myself unable to perceive how such settlements shall war against either our social interests or our republican manners. We have, it is true, no titled aristocracy, "and property does not, as in the land of our forefathers, accumulate in large masses, and descend undivided through a long line of expectant proprietors." But are we not endowed, like the people of other lands, with an appreciation of domestick stability and repose? with feelings of attachment to the order and comfort of families? And what is there inconsistent with the national duties of the merchant, if, in view of the vicissitudes of his profession, and in sight of the prolifick materials for their activity and influence in the game of hazard every where playing in modern commerce, he shall, prior to engaging in these risks, make some provision by which they whom he has made helpless dependants upon him, shall not be brought into

inevitable subjection to his disasters? some provision by which the peace, and comfort, and habits, and settled pursuits of *others* shall not be all torn up, as by a whirlwind, from their base? The Court would justify no career of ambitious splendour, nor contend for security to luxurious enjoyments or to vulgar magnificence. Far from it: and these, indeed, belong much less to settled sources of income than to the uncertain, more varying, less valued returns of adventuring enterprize. Family settlements, such as I have spoken of, have had a place in every nation advanced at all beyond primitive civilization; and cases in our highest Court and in different states of the Union, have already placed their lawfulness, with us, beyond further question.

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The Court's Opinion.

The settlement, we think, having been made without a fraudulent intent, and by a person solvent at the time, is good against subsequent creditors, though it was made in favour of a bastard child and by a person in trade.

The Case and Opinion referred to *ante*, p. 109, in marg. are here appended.

CASE.

On the 18th April, 1834, C. F. R. made a conveyance of all his REAL estate, to certain trustees, with power to let and demise the same, and to receive the rents, issues, profits and incomes thereof, and with the same to pay, in the first place, the taxes, ground rents, and all reasonable costs and charges, &c.; and further, from time to time, to pay over the surplus income, to him, the said C. F. R. on his own receipt, and in their discretion to pay and apply the same towards his maintenance and support, for and during the term of his natural life; but in such a way or manner, that the same should not be answerable for, or in any manner liable to the debts and engagements of the said C. F. R. contracted after the date of the execution of the said deed, nor be liable to any charges, incumbrance, assignment, or anticipation of him, the said C. F. R. and that from and after his decease, the trustees should hold all the trust estate

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in trust, to and for the only use and behoof of six certain natural children of the said C. F. R. And it was provided further, by the deed, that *it might be lawful for the trustees, to sell all the trust estate, at public or private sale, or the whole or any part thereof on ground rent, and to pay out of the proceeds thereof, all and singular the debts owing and due by the said C. F. R. at the date of the execution of the deed; and to invest the surplus in good real security:* with certain other provisos, &c.

The deed was recorded in the usual way, April 21st, 1834. C. F. R. died Oct. 3d, 1836.

After his decease, claims were made, and judgments obtained against his estate, and in July 1837, a bill in Equity was filed in the Common Pleas, &c.

At the time of the deed of trust, the grantor was considerably indebted, and his assignees sold a considerable part of the assigned estate in 1834,-5,-6, and paid all the debts which were known, certainly, to be within the trust. The property sold, brought more than $39,000, and the debts paid exceeded $23,000. The balance was invested in different ways, and will be applied to any remaining debts, provided for by the trust. The debts of the grantor not paid, amount, the doubtful together with the debts not to be disputed, to a sum of $17,000 and upwards. They were contracted principally in the years 1835 and 1836, and very few of them, none to a considerable amount, in the year 1834. His debts were generally of small amount, contracted in the heedless way which was his practice. He was never in trade.

Is the deed fraudulent and void as to subsequent creditors?

The bill, which set forth the deed, relied principally on the fact of debts at the time and afterwards, and of the children being illegitimate. It averred that C. F. R. left sufficient real and *personal* estate to pay the judgment which was the subject of the bill; that the real estate had been transferred in the way before stated; and that the personal estate had been removed and transferred without consideration, or concealed, and that by reason of such concealment, and such fraudulent transfer, the complainant was prevented from having execution of his judgment.

OPINION.

I have examined the deed referred to in the annexed case, and have considered the question submitted to me. The consideration of the deed 18th April 1834, was certainly not a valuable one. The deed was of that description which the law terms voluntary; and the question is, was it also fraudulent and void. So far as the object was to provide for natural children, the consideration was a moral one, because it was according to the grantor's duty; and although, in many respects, this class of children is not regarded by courts of law and equity with as much favour as children born in wedlock, I am not aware that any authoritative decision has attributed a greater degree of strength to a voluntary settlement for the protection of the latter than to a like settlement for the protection of the former. A voluntary settlement in favour of an illegitimate child has been sustained against subsequent creditors, the settler not being indebted at the

time, *Holloway vs. Millard* (1 Mad. 414, Am. ed. Phil. 1829, p. 225.) So a voluntary provision for natural children, has been inforced against the father's assets; he having defeated the settlement by a sale to a purchaser for a valuable consideration. *Williamson vs. Codrington*, (1 Vesey 511.) Atherly, in his treatise on Marriage Settlements, argues with great force against the existence of any distinction between a voluntary settlement in favour of a child and one in favour of a stranger, (*Atherly* 223.) I think it free from doubt that the circumstance of Mr. R...'s deed being in favour of his natural children, is not a circumstance which injures it It is of equal validity as if it had been made under like circumstances in favour of lawful children. In either case the settlement would be a voluntary settlement, liable to all the objections to which such settlements are subject, and not more or less subject to them, the one than the other.

I take it to be clearly settled at the present day, that a volunteer deed in favour of natural children, may be good against subsequent creditors if the grantor was not indebted at the time: that is to say, it is not in such a case fraudulent and void against subsequent creditors, by mere presumption of law, from its being voluntary; as is the case with such settlements if the grantor is indebted at the time. There must be, to make them void, some other evidence of fraud besides the mere fact of their being voluntary and there being subsequent debts. This is the doctrine to be collected from the modern cases. *Battersbee vs. Farrington*, (1 Swanston 106,) *Sexton vs. Wheaton*, (8 Wheaton 229,) *Hinde's Lessee vs. Longworth*, (11 Wheaton 199,) *Reade vs. Livingston*, (3 Johns. Ch. 481,) *Thompson vs. Dougherty*, (12 S. & R. 448.)

I regard it also as settled, that if the grantor is indebted at the time, but his debts are already secured or provided for by the settlement, then the presumption of fraud from the party's being indebted at the time, is repelled by these facts; and, unless there is other proof of fraudulent intention in regard to subsequent creditors, the deed is good against them. *Reade vs. Livingston*, (3 Johns. Ch. 481,) *Stephens vs. Olive*, (2 Brown's Ch. Cas. 90,) *Lush vs. Wilkinson*, (5 Vesey 384.) In *George vs. Milbank*, (9 Vesey 194,) Lord Eldon says, the modern doctrine is, that a provision in a voluntary settlement, for existing debts, will support it against all future creditors. I understand this to mean, not that in such a case, no circumstance of intentional fraud upon subsequent creditors will weigh against the settlement, but that the presumption of fraud from being indebted at the time, is effectually repelled by the provision, and therefore that the settlement is as valid as if he had not been indebted at the time. In such a case, the question whether the deed be fraudulent against subsequent creditors depends upon other circumstances shewing a fraudulent intention at the time.

The circumstances shewing fraudulent intention whereby a voluntary deed by one who is not indebted at the time or has made provision for existing debts is nevertheless void against subsequent creditors, are stated to be of the following kind:—as the continuance of the grantor in possession; an unusual degree of

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secrecy in making the settlement; the reservation of a general power of revocation; and the like. It has been said in *Fonblanque*, 270, (note *a*,) that if a voluntary settlement includes the whole or the greater part of the grantor's property, this is a circumstance of fraud which will overthrow it; because the grantor must have foreseen that future creditors would suffer by it: and Judge Duncan, in *Thompson vs. Dougherty*, (12 S. & R. 445,) seems to have entertained this opinion. But I can find no other authority for this opinion; and if in the last case, his Honour thought that Lord Northington's language in *Partridge vs. Gepp*, (Ambler 599,) was an authority for it, it was, I apprehend, a clear mistake; for *Partridge vs. Gepp* was a case of existing debts at the time of the advance to the children, and the language of the Chancellor is to be applied to such a case. If the quantity of the grantor's property not conveyed is insufficient to pay all subsequent debts, it may in like manner be argued, that he must have foreseen that future creditors would suffer by it: and what is this but to say, that a voluntary conveyance is not good where enough is not reserved to pay all subsequent debts! or, in other words, that no such conveyance is good against such creditors! The circumstance which makes the amount of property conveyed material, would seem to be, the clear and certain intention to contract debts afterwards, and to leave them unprotected. This comes under another head to which I will advert; but in the absence of any such foregone purpose to contract debts, I am unable to perceive any objection against a conveyance of all the grantor's property which does not equally hold against the conveyance of any part of it. Among the circumstances inferring a fraud intended upon subsequent creditors, Lord Hardwicke, in *Walker vs. Burrows*, (1 Atk. 94,) has also stated, the becoming indebted immediately after the settlement. There certainly may be cases in which debts immediately following a settlement, might speak very strongly as to the intention with which it was made: but debts of small amount, debts of weakness and heedlessness, rather than of design, might immediately follow and yet infer no such previous intention. It remains, I think, to be considered by our courts, how far the universal recording of conveyances of land under our law, ought to affect this question. It is true, that recorded or not, a deed of conveyance may disappoint a creditor; but if in fact recorded, it may perhaps be thought in no slight degree to repel the presumption of intended fraud upon subsequent creditors. I cannot find that Lord Hardwicke's dictum has been acted upon, unless in the case of persons in trade, intending to go on contracting debts in trade, as in *Thompson vs. Dougherty*. The circumstance is not perhaps very material in the present case.

To apply these principles to the deed of Mr. R....

Mr. R.... was indebted at the execution of the deed, and perhaps largely so. Had there been no provision for these debts, the deed would have been by force of the statute, and upon general principles of law, fraudulent and void against creditors subsequent as well as antecedent; for a voluntary deed, fraudulent and void against existing creditors, is so against subsequent creditors.

But the deed does make a provision for all existing debts. It gives the trustees a power to sell, and declares the trust as to the proceeds of sale, for the satisfaction of all these debts in the first instance. It was therefore not fraudulent and void against existing creditors, and consequently if it is void against subsequent creditors, it is not so by necessary presumption of law, but in consequence of other circumstances. It is true, that previous to the power of sale in the deed, there is a power given to the trustees to let and demise the property and to pay over the nett rents to the grantor during his life, or to apply them for his maintenance in such a way that they should not be answerable for his debts subsequently contracted; and no express trust is declared as to these rents to apply them to the payment of his existing debts. But it is clear that there is no trust to apply them in defeat of existing debts, but only of subsequent debts; and taking the whole deed together, I am of opinion, that the duty of the trustees is to see to the satisfaction of existing debts in the first instance. By the acceptance of the trust, the grantees became trustees for these creditors, and were bound to exercise the power of sale for their satisfaction. The power of sale rides over the trust for the application of these rents. What they had power to do for these creditors it was their duty to do, and to do it immediately if this was necessary. I therefore regard the true interpretation of the deed to be, that the trust as to the rents is subject to the power for the benefit of the creditors; and that a payment of the rents to the grantor, if it impaired the security of existing debts, would have been a breach of the trust to sell: for the power was a trust, and of paramount obligation according to the clear intention of the deed. I am therefore of opinion that the deed makes a clear provision for the satisfaction of all existing debts; and the case shews that the trustees have sold parts of the estate, and have paid all debts that were known to be of this description. The presumption of fraud from the existence of these debts, is therefore repelled, and consequently, according to the cases I have cited, the deed is good against subsequent creditors unless there are circumstances shewing an actual intention in the grantor to defraud such creditors. Upon examining the papers, and the bill that has been filed in the Common Pleas, I perceive no evidence or allegation of such circumstances. The bill relies on the fact of debts at the time and afterwards. But the debts at the time were provided for and if subsequent debts are enough *per se*, no voluntary settlement can be good against subsequent creditors. It dwells also upon the circumstance that the principal objects of the trust were illegitimate children; but this, the cases adverted to shew, is not unlawful, but as good as if the objects were lawful children. By setting forth the whole deed, the bill necessarily sets forth the trust to the grantor for life, though it does not specifically notice it as a badge of fraud. The question in regard to such a trust is of great moment. If it is void then a man cannot protect himself against his own weakness. He may grant to his family, to a stranger, to any volunteer whatever, but he cannot grant for his own maintenance, so as to exclude his subsequent creditors, nor vest in his trustees a power to supply him in their discretion, so as to make

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his maintenance certain. I am not aware of any decision to sustain such an objection. The power of the owner of an estate so to settle it as to tie his own hands as to the time, manner and circumstances of his own disposition of it, is not to be denied since the case of *Bath vs. Montague*, (3 Cha. Ca. 107—108.) Lord Holt argued that there might be very good reasons for even a wise man to put such restraints upon himself to guard against rash and precipitate wills, settlements or gifts, to prevent inconveniences that might arise from an infirmity on his part, and that no Court of Equity, any more than of law, could relieve him from the restraints so deliberately imposed upon himself. The same is equally true as to voluntary settlements, providing for the certain maintenance of the grantor. They may be fraudulent against subsequent creditors for other causes: but are they so, because, instead of declaring an immediate trust for children, they declare a trust for the grantor himself during his life? I confess I do not perceive why they should be so, nor why, if the estate may go to a volunteer or stranger, so as to elude a subsequent creditor, it may not also go to the settler himself in such a way as to prevent creditors reaching it. Such a trust may, in connection with others, tend to raise a presumption of fraud; but by itself, I do not think it has ever been so held. The point yet remains to be settled.

In like manner, the bill, by setting forth the whole deed, shews that it conveyed ALL the grantor's real estate; but it does not point it out as a specific objection. On the contrary, it alleges that which is adverse to the objection and might be fatal to it, namely, that the grantor had personal property also, which he left at his decease, but which had been removed or transferred without consideration, or concealed:—matters not charged nor chargeable upon the deed of April 1834, or the trustees.

This objection, if made, ought, I think, to be over-ruled. As regards the grantor's becoming indebted immediately after the deed, and thus shewing a fraudulent intent, the case states the contrary. The great mass of subsequent debts does not shew fraud intended by the conveyance, so much as it shews a continuance of the weakness against which, as possible, though not as intended, he wished to guard his children and also himself. He was never in trade. He did not mean to go into trade. They were in general, debts of folly, committed upon a sudden temptation; not the result of previous purpose or design.

There was no concealment. The deed was executed on the 18th of April, and recorded in Philadelphia on the 21st of the same month; and it contains no power of revocation, nor is there any evidence or allegation that the grantor continued in possession or in the exercise of any control or management of the property. My opinion upon the whole is, that the deed may be sustained against the subsequent creditors; not being fraudulent and void against them, though voluntary.

HON. BINNEY.

Philadelphia, Oct. 10, 1838.

Memoranda.

HENRY BALDWIN, L. L. D., Presiding Judge of this Circuit, died April 21st 1844, in the 65th year of his age. He had presided in this Circuit since January 6th 1830. By commission from President Polk, dated August 4th 1846, ROBERT C. GRIER, L. L. D., President Judge of the District Court for the County of Allegheny, in this State, succeeded to his place.

ARCHIBALD RANDALL, District Judge for the Eastern District of Pennsylvania, died June 8th 1846. By commission from President Polk, dated June 17th 1846, JOHN K. KANE, Attorney General of Pennsylvania, succeeded to his place.

THOMAS McKEAN PETTIT, Esquire, by commission from President Polk, dated May 5th 1845, succeeded HENRY M. WATTS, Esquire, in the office of District Attorney.

UNITED STATES VS. HARDING ET AL.

[NEW TRIAL: SENTENCE.]

Where two or more defendants are jointly charged in the same indictment with murder, it is competent for the jury to find one guilty of murder and another of manslaughter, and on such a verdict being rendered, it will not be disturbed by the Court as irregular.

After a conviction in the United States of a capital offence, it is in the discretion of the Court to grant a new trial on the application of the prisoner: it being competent for the prisoner himself, by such application, to wave the benefit of that clause in the constitution which provides that no man shall be put twice in jeopardy of life or limb for the same offence.

Where the judges who compose a Court have all been commissioned subsequently to a verdict, taken by a former Court, of murder as to one defendant and manslaughter as to others; which former Court became vacant by the death of all its judges pending a motion for a new trial in the case on the ground that the verdict was against evidence and against law; the new Court will not award sentence on the verdict as to defendants who ask for a new trial; nor will that Court hear evidence as to what opinion on the motion for a new trial, the former Court had formed; the same having been confidentially expressed to an officer of the Court, and not yet made known from the Bench.

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At a Circuit Court held in May last, before the late Judge Randall, district judge of this district, then sitting for the Circuit Court, Harding was found guilty of *Murder*, and Grimes and Williams of *Manslaughter*.—The indictment was *for Murder, and against them jointly;* Harding being charged as principal, and the other two as present, aiding, abetting and assisting. Application was made soon after the verdict for A NEW TRIAL, and the application very fully argued before Judge Randall. His Honour had formed, after the hearing, and expressed to an officer of this Court (as it was offered to be proved) his opinion on this application, but just as he was about to deliver it, sudden illness arrested his design, and soon after terminated his life. Judge Baldwin, the circuit judge, had died some time before; so that before any decision had been given upon the motion

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for a new trial, the Bench became VACANT. In this state of things the present judges received their commissions; and the application for a new trial came again to be argued, before them, on the same reasons which had been filed originally in the cause. Among these were:

STATEMENT.

Because the verdict was against the evidence:

Because the Court charged the jury (and so is the law) that if the defendants, or either of them, were present, aiding, abetting and assisting Harding in the assault made upon the deceased, the person (or persons) so aiding, abetting and assisting, was guilty of the same offence as that committed by Harding; and if said defendants were not so present, aiding, abetting and assisting, they are not guilty of any offence of which they can be convicted under this indictment. Nevertheless, the jury convicted Grimes and Williams of manslaughter, and Harding of murder; whereas they all should have been convicted of murder or of manslaughter, or acquitted.

The only proof of what the evidence on the trial, or the charge of the Court was, were the notes of counsel who tried the case, and a report of the trial in one of the newspapers of the day, professing to give, in most parts, the words of the witness, or Court, though in others, their substance only, and sometimes their effect.

On the argument before the new Court, the attention of counsel was directed to the following points:

1st. Whether it was in the power of the Court to grant a new trial after a capital conviction.

2d. Whether the present Court, being composed of judges whose commissions bear date since the verdict in the case, and who therefore have no judicial knowledge of its merits, can pass sentence on the prisoners.*

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These points, with those already mentioned as having been made before the former Court, were accordingly now argued:

Mr. Pettit, D. A. U. S. and Mr. J. M. Rush, for the prosecution: The finding is good. Hawkins lays it down, that "if there were malice in the abettor and none in the person who struck the party, it will be murder as to the abettor, and manslaughter only as to the other."† This embraces our case in principle; and it has been decided in instance, as long ago as 1795, and in our own country.‡

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† Pleas of the Crown, Book II. Ch. 29 § 7.

‡ The State v. Arden, 1 Bay, 487.

The power of the Court to grant a new trial in capital cases, has been denied by Story, J.§ with ear-

*By act of Congress April 30th, 1790, manslaughter, of which two of the prisoners were convicted, is punishable *in the discretion of the Court*, with imprisonment not exceeding three years, and fine not exceeding $1000.

§ United States v. Gibert, 2 Sumner 19–107; decided in 1834. In the case here referred to, Mr Justice Story examines the matter very laboriously at common law and under the Constitution. He cites many cases to shew that it is a fundamental maxim of the common law, that there can be no second prosecution in a capital case, where there has been a verdict of acquittal or conviction regularly had upon a sufficient indictment; and makes it evident that in England the practice where a prisoner has been wrongfully found guilty, is to apply to the Crown for relief. The American decisions (of which he cites three where new trials have been had in capital cases,) he disposes of by the remark, that in most of them the constitutional prohibition was not made a point in the case, or that the trial was in a local court, where the constitution of the State contained no clause similar to that in the Constitution of the United States, or that the case was ill considered, imperfectly reported, or. on some other account, not strong authority. He thinks that the mode usual in England of application to the Executive, is perfectly adequate to secure the ends of justice here; that the Court

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nestness; and there is an *obiter dictum* to the same effect by Sutherland, J.* of New York. It is proper to state, however, that we rest our case upon the merits; more particularly since, in another case† decided by Story, J. in 1835, he uses language apparently irreconcilable with the opinion set forth by him in 1834.

* The People v. Comstock 8 Wendell, 549.

As to the right to pass sentence. In civil cases, the power of a judge to give judgment on a verdict taken by his predecessor, is clear,‡ and it has been decided to exist equally in criminal cases: 1. In Pennsylvania (*Anon.*)* where it is said to have been decided (and apparently on principles independent of the State law) that where the indictment is good, and there is no errour in the trial, (the sentence only being defective,) the court will not send the prisoner back for a new trial, but will sentence him *de novo:*

‡ The Life & Fire Insurance Co. v. Wilson, 8 Peters, 291.

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itself, if conscious of serious errour, would aid in such application; and remarks, that this ultimate appeal to the pardoning power has been deemed satisfactory and safe in the land of our ancestors. His Honour, however, takes up each of very many reasons presented for a new trial, and after examining them separately, and at length, concludes that if the power to grant a new trial exists, the case is deficient in merits. Judge Davis, the district judge dissented from Judge Story as to the power to grant a new trial, which he thought clear, if the prisoner desired one; but agreeing as to the absence of merits, the motion for a new trial was of course, over-ruled, and on that ground alone.

† United States v. Battiste, 2 Sumner, 240-251; where in arguing on a capital case, against the right of the jury to pass upon the law, his Honour says: "If the jury were at liberty to settle the law for themselves, the effect would be not only that the law itself would be most uncertain from the different views which juries might take of it, but in case of errour there would be no remedy or redress by the injured party; for the Court would not have any right to review the law, as it had been settled by the jury.—On the contrary, if the Court should err in laying down the law to the jury, *there is an adequate remedy for the injured party by a motion for a new trial,*" &c. p. 243–244.

*Mentioned from the Bench, in Drew v. The Commonwealth, 1 Wharton, 281.

2. In Alabama, *(Charles vs. The State,)** where it was decided, in a capital case, that a judge who is appointed since the one who took a verdict of guilty, and who died before he pronounced sentence; has power, equally with the former judge, to proceed and give sentence in the case. As to the prisoners convicted of manslaughter, they cannot object if they receive the lowest measure of punishment. It is *intimated* in the case just cited,† that if there be any doubt as to whether the verdict was against evidence the new judge may ascertain whether or not his predecessor was satisfied with it. We do not, however, suggest such an inquiry, unless the information be desired by the Court, when we should be able to make known the conclusion to which the late Judge Randall had, in point of fact, arrived.

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* 4 Porter, 107–111.

† p 110.

The MERITS of the case were, of course, fully discussed on both sides.

Mr. D. P. BROWN for the Prisoners: Hawkins, though his work is in general weighed down with references, does not, on the point for which he is cited, refer to a single case. *A single case,* counsel here have found; but that vouches no authority as good as Hawkins himself.

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On the first point, the regularity of the Verdict.

[The counsel was about to pass over the 2d point, as waved by the candour of the District Attorney; but the Court desiring to hear it spoken to by the defence, he proceeded to argue it.]

On the 2d point, the power to grant new trial in capital cases.

The construction given in *The United States vs. Gibert,*‡ (or rather by Mr. Justice Story, in that case,) to the provision of "not twice in jeopardy," is shocking on principle, and on precedent is false. If upon

‡ 2 Sumner, 37–62.

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a good record, one which affords no evidence of a *mis*-trial, a person whom the Court believes to be innocent is found guilty through the prejudice of the jury,* what is to be done? or if the Court has admitted testimony which reflection satisfies it was not evidence? or asserted doctrine which it discovers was not law? These are common cases: Extreme ones may be supposed. Mr. Justice Story argues, that the prisoner may apply to the Executive, and "it cannot be doubted," he proceeds, "that the Court, *if conscious of any serious error*, would cheerfully aid in the application." But the Executive is not bound to pardon, and may decline. What then becomes of the prisoner? He has been found guilty. He is believed to be innocent. A new trial cannot be granted him. The Executive does not pardon; and the Court, "CONSCIOUS," by Mr. Justice Story's hypothesis, of "SERIOUS ERROR," is——to do what? To sentence him to death? To discharge him after a verdict of guilty? Or to leave him to die a natural death in gaol?—when, if innocent, he ought to be at large, or, if guilty, to be hanged. Besides, if the Executive have power to pardon it has none to acquit. If the prisoner is admitted to be innocent, he has a right to be found so; for every man charged with an offence has a right to a fair and legal trial.† Is it not moreover

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* This case, the counsel said, had occurred in Ball v. The Commonwealth, 8 Leigh, 726, where the Court believed that the evidence was "utterly insufficient," and where the jury, disregarding all recommendation from the Court, persisted in adhering to a verdict of GUILTY.

† In both the cases of The State v. Hopkins, 1 Bay, 372, and United States v. Fries, 3 Dallas, 515, the prisoner, found guilty on the first trial, was acquitted on the second. The same result took place, it is probable, in Jerry v. The State, 1 Blackford, 395, and in Ball v. The Commonwealth, 8 Leigh, 726; in the former of which cases, the evidence on which the verdict was given is said to have been doubtful, and in the latter, "*utterly* insufficient."

a mistake as to the true nature of Executive power, to treat the President as a Court of Errour and Appeals? There are many cases—among them the case of great State criminals—in which *policy* may require a remission of a punishment strictly due, and for a crime certainly ascertained. The peculiarly appropriate sphere of Executive action is in such cases; and the very notion of mercy implies the accuracy of theoretick justice. April Sessions, 1846.

The doctrine in question is at war with all American authority. The clause of the Constitution relied on by Judge Story was adopted in 1789, and until 1834, when that late eminent judge gave to it a new construction, no one ever doubted that it was made in favour of life, and not for its destruction. The former construction had been given to it in many cases, as

I. In 1794, by one of the Superiour Courts of South Carolina;* Rutledge, afterwards Chief Justice of the United States presiding. Judge Story would intimate, indeed, that the case was not one of a capital offence; but to any one who reads the report, nothing can be clearer than that it was so;† and the fact noted by Judge Story, "that the power to grant a new trial was silently TAKEN FOR GRANTED on ALL sides," argues quite as much in favour of the power as it can detract from the value of the decision. "The Constitution of South Carolina," the learned judge thinks it "material" to state, "contains no pro-

* The State v. Hopkins, 1 Bay, 372.

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† One of the counsel in arguing for a new trial, on the ground of an unfair verdict, says: "The juryman had declared that he was 'determined to HANG the prisoner at all events.' No words could possibly express a greater degree of malice and ill will against the unfortunate man whose LIFE was about to be committed to a jury of his country." p. 373.

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hibition on the subject." But *how* is this material, if, as his Honour has taken so much pains to shew, —and as no lawyer ever doubted—the Constitution of the United States only incorporated into itself, a maxim "*embedded in the very elements of the Common Law;*"* or if, as other judges have thought† and as seems but rational, the provision of the Federal Constitution, being general in its nature and unrestricted in its terms, operates by the very provisions of the instrument, as well on State Courts as on Federal:

II. In 1795, in this circuit,‡ and in a case admitted by Mr. Justice Story, to be an authority in point; Mr. Rawle, D. A., and Mr. Sitgreaves, both conceding that "the *power* to grant a new trial could not be denied." "But," objects Mr. Justice Story, "the clause in the constitution was not even alluded to, much less reasoned out: the Court did not, in giving their judgment, in any manner speak to the point," and he thinks that it is not too much to say, "that the Court might have been *surprised* into the decision." This truly is to make trim reckoning of a judicial adjudication! and I have only to say, that if in 1795, judges and counsel like those in that case; men, all of them, of education and understanding; bred in the apostolick age of our country, and breathing the air of the Constitution when it imparted every where its energy and spirit, could not, any of them, see in that Constitution aught which touched the case before them: then that no such thing existed there. Or, at any rate, that it will not be given to either judge or counsel in these later days to discover it.

* United States v. Gibert, 2 Sumner, 42.

‡ United States v. Fries, 3 Dallas, 515.

†See the language of Spencer, C. J. in the People v. Goodwin, 18 Johnson, 201.

III. In 1825, in Indiana;* a State in whose Constitution it is admitted that there is a clause like that in the Constitution of the United States. April Sessions, 1846.

* Jerry v. The State, 1 Blackf'd, 395.

Here then are three *adjudications*, all of which *The United States vs. Gibert*, treats as of no authority at all. And if the language of Mr. Justice Story in that case was in the face of all prior decisions; all subsequent decisions are in the face of it. As

I. In 1837, in Virginia,† where the doctrine asserted by Judge Story was brought directly before the Court, and over-ruled; the judge who had ventured it below, concurring with all his brethren in over-ruling himself above.

† Ball v. The Commonwealth, 8 Leigh, 726.

II. In 1844, in Alabama,‡ where, after commenting on *The United States vs. Gibert*, the Court declares: "It cannot be questioned that the clause was intended for the protection of the citizen; and it would be a *mockery* to put such a construction upon it, as will make it operate to his prejudice."

‡ The State v. Slack, 6 Alabama, 676.

On the 2d point, the power to grant new trial in capital cases.

Each of these five cases is a *decision on the point;* and I may well leave for others the collection of the many cases where, though a new trial has been refused, the power to grant them has been recognised, and those many more others in which, without any discussion of the point, a new trial could not have been properly granted, unless the power exists.§

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As to *The United States vs. Gibert*, itself, the new trial was refused upon the *merits:* Judge Davis, the district judge, dissenting from Judge Story on the question of power, and both judges concurring as to

§ See cases of both sorts collected in Mr. Wharton's Treatise on American Criminal Laws, pp. 623–635.

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the absence of merits. The whole disturbance, therefore, of the criminal system which has been caused in this matter, arises from an extra-judicial dissertation of a single judge. A dissertation, it may be added, not close in point of argument, and far from either respectful or accurate in the consideration of authorities.

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On the 3d point, passing sentence.

III. The Court will not give sentence unless satisfied with the verdict; and how can it be satisfied with the verdict unless it knows upon what evidence the verdict was given? There is no proof before this Court of that evidence. Even had there been no motion for a new trial, the former Court would not have given sentence if not satisfied with the verdict. The case is stronger here, because a question was yet pending and undecided as to the propriety of the verdict. In the strongest case* cited on the other side, there was no motion for a new trial; and the question was therefore merely one of the naked power upon a state of admitted guilt. The *exercise* of the power is suggested by the Court itself as a very different thing; and the Court leaving the straightest line of its duty, stretches forth its hand to give the prisoner that aid which the Court below and his counsel had unaccountably omitted to give him.†

* Charles v. The State, 4th Porter, 107–110.

† "The facts relied upon in support of the motions," says the Court above, "did not affect the *power* of the Court to give judgment in this case, and therefore gave the prisoner no right to be discharged, or to arrest the judgment.

Whether the Circuit Court, in the exercise of a sound discretion, ought not voluntarily and without a motion from the prisoner, to have granted him a new trial, is a point which that Court did not reserve for the consideration of this. It is true, as the counsel of the prisoner affirmed, that Sir Matthew Hale never would give judgment, or award execution, upon a person who had been reprieved by another judge, because he could not know for what reason he had been reprieved; *and his rule in this respect, has been, in general, observed by his successors.*" p. 109–110.

But even if judgment were given as to the prisoner found guilty of murder, how is it to be given as to those found guilty of manslaughter; and whose punishment rests in the *discretion* of the Court. You may sentence, it is said, to the lowest measure of punishment! but unless such sentence be the result of the Court's discretion, it is improper. It is said that the prisoner cannot complain, if deserving a higher degree of punishment he receives a less. But the United States may; and so may the prisoner, if he receives, through ignorance or from irrational doubts that smaller measure to which he is entitled from an enlightened understanding acting upon ascertained facts.

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On the 3d point, passing sentence.

Of the anonymous case* in Pennsylvania, we have an imperfect report; while all that it is said to decide may be admitted. It may be that a sentence "defective" merely, can be set right in a Court of errour; for the question before such a Court is independent of the merits.

Grier, J. The opinion of the Court will be delivered by my brother Kane; my engagements on the Circuit having occupied most of my time since the argument of this motion. I may take this opportunity to say, however, that had I been left to my own unassisted investigations, I would not, most probably, have arrived at the conclusion that a new trial ought to be granted; *not because I believed this Court has not the power*, but because the reasons alleged were clearly insufficient.

The Court's Opinion. October 12th. Justice Grier.

* Cited in Drew v. The Commonwealth, 1 Wharton.

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I am abundantly satisfied that the prisoners have had a full and fair trial, and that the learned judge who presided on the occasion, in the leniency and kindness of his heart, accorded to them every indulgence and protection to which they were entitled by the laws of the land.

The Court's Opinion. October 12th. Justice Grier.

I would not, however, while my learned brother entertained doubts on any part of the subject, have assumed the responsibility of pronouncing sentence of the law upon the prisoners. A careful examination has tended to confirm the original suggestions of his mind; and it is due to him to state, that the thorough investigation he has given to the subject, and the able arguments which he has urged in support of his opinion have gained my hearty concurrence.

The Court's Opinion. October 12th. Justice Kane.

Kane, J. The considerations which determine the opinion of the Court, are altogether independent of any discussion of the reasons filed. It is enough that there is a question of merits, referring itself to evidence that is not before us. We cannot, unless under the coercion of a necessity which admits of no escape, undertake the exercise of a judicial discretion without legal assurance of the facts by which it should be guided.

It is asserted upon this record by the prisoners, that the verdict of conviction was against evidence; and we do not know what the evidence was; that it was against law; and not being informed of the facts, we cannot know what were the legal principles

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they invoked: that it was against the charge of the Court; which charge we have not seen. We are called on to pronounce the sentence of death against a man, whom the judge that tried him may have thought clearly innocent; and to measure out sentences of imprisonment and fine against two others, in terms and amounts resting in our discretion, without judicial information of their grades of guilt.

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The record which is before us is, of course, barren of facts. The notes of the counsel for the prosecution, made to assist them in argument, but not professing to detail the evidence in the words of the witnesses, still less affecting to portray their spirit and manner: these, and the columns of an irresponsible newspaper, that gives sometimes the language of the witness, sometimes its import, and sometimes the reporter's opinion of its value: these and nothing more are to form the basis of our judicial action. The notes of the judge who tried the case upon the merits —the certificate of his opinion, if indeed he had formed one—the very material for our review: these are not before us. The questions presented to us for our solemn judgment depend upon facts, which are neither admitted nor proved.

To my mind, the principle of the law is clear: the defendant, before sentence can be pronounced on him, has a right to the judicial determination of his guilt by the Court as well as by the jury. If the verdict does not satisfy the conscience of the judge, the prisoner is entitled to a new trial. After the verdict is rendered, the judicial discretion is still in exercise;

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and at any time before the sentence is recorded, it may modify the punishment if the statute has not made it specifick, or set aside the conviction altogether. It does not need a motion on the part of the defence; the judge himself, at the very latest moment, may *sua sponte* award a new trial. This is done not unfrequently in England, if the offence is below the grade of felony; and in other cases, the English court respites the prisoner till the royal prerogative can either commute the punishment, so as to conform it to the merits, or relieve against the improper conviction by a pardon. In our country, where the powers of the Constitution are distributed differently, and the chief magistrate has no part in the judicial administration, the experience of all of us is full of precedents for the grant of new trials upon the suggestion of the Court.

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The prisoners here were entitled to the advantage of this judicial revision, from the judge who sat upon their trial; and whether we will intend *in favorem vitæ*, that he was disinclined to pronounce the capital sentence; or whether we content ourselves with an admission of the fact that the time in which this judicial discretion might be exerted had not yet expired; we cannot affirm, in either case, that Judge Randall was content to enter judgment on this verdict. Even were we now satisfied what were his opinions at the time of his decease, we should be without just and legal assurance that they might not have been modified by after reflection, and before the appropriate moment for recording them. I had no wish, therefore, to hear the evidence, which it was

intimated at the argument was perhaps within our reach, of the views confidentially expressed by Judge Randall. A judge's opinions become operative only when they are solemnized by their assertion from the bench.

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I have alluded incidentally to the diversity between our practice and that of the English courts, on the subject of new trials after convictions for felony. I cannot doubt that this diversity exists, and that it has its foundation in sound reason and the differing character of our institutions. I do not review the American cases that establish it, only because this has been perfectly well done in a recent treatise by a member of our own bar.*

* Wharton's Am. Crim. Law, pp. 623–635.

But there is a reason for our departure from the English rule, which is to my mind conclusive. The British constitution, like the common law, is made up in a great degree of principles inferred from long continued usage. Among these is the combined attribution to the sovereign, as the fountain at once of justice and mercy, of the power and the duty to apportion punishment to the guilty, and to shield the innocent from wrong. Whatever assurance the English people have that the other powers of sovereignty shall be rightfully exercised, they have in regard to this. It is surrounded by the same safeguards against *non-user* as well as against abuse. I do not remember to have read of a single instance in which the judicial recommendation has been disregarded by the ministers of the crown, and I do not suppose that it could be without a breach of the constitution of the realm.

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THE COURT'S OPINION. October 12th. Justice KANE.

In England, therefore, the denial to the Courts of a revisory power over verdicts in any cases, is apparent rather than real. The judge, if dissatisfied with a conviction on the merits, respites the sentence or reprieves the prisoner, and the king's prerogative interposes to do justice as a thing of course. If there be a doubt upon any point or proceeding connected with the case, such as with us would be reviewed on a motion for new trial, the judge reserves the question—it is argued by counsel upon his report before the twelve judges, and the action of the king is determined by their advice. Indeed, the pardoning power in England is so entirely regarded as forming part of the justical administration, that from the time of the statute of Gloucester, c. 9, down to the present day, the right of a prisoner to demand a pardon, under certain circumstances, has been expressly and repeatedly affirmed by acts of Parliament.*

* Hawkins' Pleas of the Crown, B. 2. ch. 37.

It is unnecessary to refer to our American constitutions to show that the power of pardoning as conferred by them—in consequence of the absolute and entire separation of the judicial from the executive departments, and the exclusion of the former from the right to grant reprieves—cannot relieve a judge from the responsibilities of an erroneous or improper conviction. With us, therefore, the new trial becomes an indispensable resort.

I am aware that one of the most eminent of our jurists† has found an inhibition in the constitution against the grant of new trials in cases involving jeopardy of life. But I cannot realize the correctness of the interpretation, which, anxious to secure a citi-

† Story J., in U. S. v. Gibert, 2 Sumner, 19.

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zen against the injustice of a second conviction, requires him to suffer under the injustice of a first. Certainly I would not subject the prisoner to the hazards of a new trial without his consent. If, being capitally convict, he elects to undergo the sentence, it may be his right, as it was to have pleaded guilty to the indictment. When, however, he asks a second trial, it is to relieve himself from the jeopardy in which he is already; and it is no new jeopardy that he encounters when his prayer is granted, but the same divested of the imminent certainty of its fatal issue.

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Reference is also had to the rule of the common law, as it stood when the constitution was adopted; and the language of the judiciary act is supposed to present a further difficulty, inasmuch as it limits the power of granting new trials to cases in which there are "reasons for which new trials have *usually* been granted in courts of law."* But within the limits of this circuit at least, from the earliest judicial date to the present time, there has been no recorded case in which a new trial has been refused for the want of authority in the Court to grant it. The circumstances of the present case are novel, and in one sense therefore, the reasons for a new trial may be said to be *unusual*. But our power cannot be qualified by the absence of precedent, if the principles of accustomed and essential justice invite our action.

* Act of 28th September 1789.

It is the characteristick excellence of the common law, that it adapts itself to the circumstances of men and makes progress with the age. Its principles, legitimate deductions of right reason are, of course,

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invariable; but its rules of conduct and its modes of procedure change with the social and intellectual condition, which it is their office to supervise and protect. Time and advancing freedom of mind have modified the barbarous usages and penal inflictions, that characterized at one period the administration of criminal justice. The law of contracts has expanded with the necessities of expanding commerce. The rights of conscience and of political and civil liberty have been developed, and have found safeguards. But through all these changes the great principles of the common law have remained the same.

Our ancestors brought this law with them, in all its capacities of adaptation and expansion. They abrogated none of its principles, when they emancipated their lands from the feudal tenures and their liberties from hereditary rule. They adapted its rules to their circumstances, but they left its principles unchanged. They claimed it as an inheritance, for themselves not only, a scanty band of emigrants on a savage continent, but for their posterity, enriched, powerful and free; and they transmitted it to us, with all that flexibility to the varying exigencies of men, which had so signally commended it in their own experience. It is of little moment, and always has been, what are the *forms* of the common law, whether declared by regulation or inferred from usage: they are the means, not the end; and so soon as they fail to secure the great objects of the law itself—enlightened and substantial justice, the form must give way to the principle.

I have looked with some care through the English

books, but have not been surprised to find that they supply few materials for reference on this question. In fact the organization, as well as the practice of the English Courts is such, that a case like this, in all its circumstances, can scarcely by possibility occur there.

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Yet I have found enough to satisfy me, that where those Courts are vested with a discretion as to their action on a verdict, that discretion is never exercised without unequivocal, direct, judicial knowledge of the facts disclosed on the trial. Either the action upon the verdict is by the same court before which it was rendered, or all the facts that are not patent on the record, come up by formal certificate from the judge who heard the evidence. The only case that we read of, in which this caution was disregarded, is that which is commemorated in the note of Sir Matthew Hale, and on which he seems to have grounded his rule—"Never to give judgment or award execution upon a person reprieved by any other judge but myself, because I could not know upon what ground or reason he reprieved him."*

* 2 Hale's Pleas of the Crown, ch. 56, p. 406.

At the common law, before the statutes of 11 Henry VI. c. 6, and 1 Edw. VI. c. 7, if a prisoner had been convicted before commissioners of oyer and terminer, and a new commission issued before the award of execution, no judgment could be entered or execution ordered by their successors. "And there was," says Mr. Chitty,† "some reason for this restriction; for the subsequent judges were unacquainted with the circumstances of the case as developed on the trial, and might therefore unconsciously be the occasion of injustice."

† 1 Criminal Law, *697

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The Court's Opinion. October 12th. Justice Kane.

In the case of the *King* v. *Baker*,* where there had been a conviction by verdict, (of speaking seditious words,) which was removed by certiorari into the King's Bench, it was said that that court "never gives judgment on a conviction in another court; but the practise is, after issue joined in another court and the indictment removed, always to admit the party to wave the issue below, and to go to trial upon an issue joined in this court;" and in that case, "the court directed a new trial, and Baker was found guilty by a second verdict."

* Carthew, 6.

On the authority of this same case, the court, in the case of the *King* v. *Nichols*,† refused to sentence on conviction for conspiracy in an inferiour court, which had been brought up by certiorari between verdict and judgment, on the ground that "the fine being discretionary in the court, upon the circumstances of the case as it appeared in evidence upon the trial, the justices who tried the merits are the only proper judges to assess the fine."

† 13 East, 415, *note.*

The same principle is recognised in the case of *Warrain* v. *Smith*, in the King's Bench,‡ where it is said by Coke, C. J. referring to the case of Sutton's hospital, that in the exchequer chamber, if one of the judges die pending the argument, and another be appointed after the argument had, he shall not give his opinion in the case.

‡ 2 Bulstrode, 147.

The only case I have found, in which execution was awarded by the Court of King's Bench when it had only the record for its guide, is that referred to by Sir John Strange, in his argument in the *King* v. *Nichols*,† already referred to. It was the case of

a capital conviction, brought up by certiorari from one of the counties. But the learned counsel who cited it, admitted that it was distinguishable from the other cases in this—that "the judgment was certain, and no discretionary power in the court,"—circumstances that distinguish it also from the present case, since as to two of these defendants the judgment is not certain, and, if I have reasoned rightly, the court has a discretionary power as to all.

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The order of the Court is, that a new trial be granted to *Harding*, and that as to *Grimes* and *Williams* the case be continued for one week, at the expiration of which they are to elect whether they will take a new trial or abide by their former conviction.

His Honour Judge Grier then addressed Grimes and Williams as follows:

October 12th. Justice Grier to Grimes and Williams.

William Grimes and John Williams—You ought clearly to understand and weigh well the position in which you now stand. You have been once tried and acquitted of the higher grade of offence charged against you in this indictment, the penalty affixed to which is death; but you have been convicted of the minor offence of manslaughter. Your lives have been in jeopardy and you have escaped. The constitution of your country declares, that "no person shall be twice put in jeopardy of life or limb for the same offence." This is to shield you against oppression and injustice, and puts it out of the power of the court to subject you to the danger of another trial, except at your election and request. We believe

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that you have a right to wave the protection thrown around you by the constitution, for the sake of obtaining what may seem to you a greater good. But let me now solemnly warn you to consider well the choice you shall make. Another jury, instead of acquitting you altogether, may find you guilty of the whole indictment, and thus your lives may become forfeit to the law. If you choose to run this risk, and to again put your lives in jeopardy, it must be by your own act and choice, being neither compelled nor advised thereto by the court; and when your solemn election shall have been put on record, the court will hold you forever after estopped to allege that your constitutional rights have not been awarded to you.

October 12th. Justice Grier to Grimes & Williams.

Before we enter of record an order for a new trial as to *you*, we will give you one week to ponder carefully on this subject, and consult with your counsel as to what will be your safest and best course.

Election of new Trial, 20th Oct.

On a subsequent day, these two prisoners appeared in court, and being called upon to make their election whether to take a new trial or abide by the former conviction, declared their determination to take a new trial. The whole of them were afterwards tried anew, and a verdict of *guilty of manslaughter* was found against Harding and Grimes, and Williams was acquitted.

New Trial 2d to 11th of Nov. and verdict 11th Nov.

Sentence 17th November.

Harding was sentenced to three years imprisonment and fine of $1. Grimes to one year imprisonment and a like fine.

[APRIL SESSIONS 1846, NO. 3, CRIMINAL DOCKET.]

PARKER VS. CULVERTSON.

[GUARANTY. PURSUIT OF PRINCIPAL DEBTOR.]

The word "guaranty" is somewhat technical and limited in its signification in Pennsylvania; and where it is employed, the creditor must enforce his remedies against the principal debtor before he resorts to the guarantor; or else he must shew that the affairs of such principal debtor were in such a condition that any pursuit of him would have proved fruitless. This at least, unless the agreement of guaranty is in some way qualified so as to control this the obligation which, when the word "guaranty" is used, it commonly imposes.

STATEMENT.

On the 25th of May 1839, Chambers executed to Parker his bond and mortgage for $10,000, payable one year after date; and as a collateral security, assigned to him a bond and mortgage of one Wharton, dated the 30th March 1839, "to SECURE the PAYMENT of $6000 ON the 30th March 1841." On the 20th of March 1840, more than a year before this last bond became payable, Chambers applied to Parker to receive Wharton's bond and mortgage of $6000 *as an absolute payment, pro tanto,* and to release from the lien of this last—the mortgage of $10,000—all the property embraced by it, certain inconsiderable items excepted. Parker agreed to do this, on condition of one Culvertson's becoming security for the payment of Wharton's debt of $6000, and the balance, $4000, which would yet remain due of Chamber's. And accordingly by a deed poll, reciting all the above facts and executed contemporaneously with a release of lien by Parker, and his acceptance of the collateral security of $6000 as payment, Culvertson became security, in effect as follows:

APRIL SESSIONS, 1846.

"I do hereby covenant and agree and hereby GUARANTEE to the said Parker, THE PAYMENT *of the said debt or sum of six thousand dollars* SO AS AFORESAID *secured to be* PAID by the said Wharton to the said Chambers and assigned to the said Parker as aforesaid: and do hereby also covenant and agree to *guarantee the payment* of the balance of the said debt of ten thousand dollars, to wit, the sum of four thousand dollars, which, upon the acceptance of the said bond of said Wharton as payment, will still be due by the said Chambers to the said Parker, and for the further security of which the said Parker will also hold his mortgage before mentioned, upon two lots, &c.—; all the other lots having been released by the said Parker from his said mortgage. And I do hereby covenant and agree to and with the said Parker, his heirs and assigns, that the SECURITY OF HIS DEBT of ten thousand dollars and its interest so due and owing to him by the said Chambers shall, in no wise, be *affected or rendered less secure* in its ULTIMATE PAYMENT to the said Parker, by reason of any thing contained in the release of the said Parker bearing even date herewith, but that the said debt shall be WELL and TRULY PAID."

STATEMENT.

The above mentioned parties were all residents of Pennsylvania, where the mortgaged property was situate and *where all the contracts connected with the matter were made.* Before the bringing of this suit Parker alone became a citizen of New Jersey.

Wharton's bond not having been paid, and the mortgaged premises having produced, on sale, but $1380, Parker brought this action of covenant to

April 1845, against Culvertson, to recover from him the deficiency on his aforementioned deed poll. APRIL SESSIONS, 1846.

STATEMENT.

The FIRST count of the declaration, which contained two counts, recited the mortgage of Chambers for $10,000, and the assignment of the mortgage of $6000, as collateral; that plaintiff agreed, at the instance of Chambers, to take Wharton's mortgage as payment instead of security, and to release certain property in Chambers' mortgage: in consideration of which the defendant agreed to *guarantee the payment* of the said debt or sum of $6000 by the said Wharton; and *averred* that the said Chambers and the said Wharton, had not, and that neither of them had paid any part of the $6000, of which defendant had notice. *Breach*, in non-payment.

The SECOND contained the same recitals as the first; and *averred* that after the date thereof, that is to say, on the first of Jan. 1844, the plaintiff caused process to be issued on the mortgage, and obtained judgment, &c. by virtue whereof the premises were sold, and produced only $1350, &c. whereof defendant had notice. *Breach*, in not paying, &c.

The *validity in substance* of this declaration now came before the court, on the plaintiff's demurrer to certain of the defendant's pleas, and on the defendant's demurrer to one of the plaintiff's replications. The alleged defect in the declaration was, ***that it omitted to aver either that Wharton had been pursued to insolvency by the plaintiff, or that his circumstances were so desperate that any pursuit of him would have been attended with no benefit.*** And this point it was which formed the matter of the argument.

NIL SESSIONS, 1846.

Mr. T. I. WHARTON for the Plaintiff: Mr. Wharton was bound to make payment of his bond, "*well and truly*," at the day; and Culvertson guarantees THAT PAYMENT. Payment, unqualified, means payment according to the tenor of the bond, i. e. "at the day," not at some future, uncertain, unknown day, after all the remedies of compulsive justice have been exhausted and found vain. Our guaranty is not, as, in one case,* to pay if A. should "*fail to collect;*" nor as in another,† that the note is "*good and collectable after due course of law;*" nor, as in a third,‡ *to secure I's. note out of certain property;* nor as in two other cases§ for the "*collection*" of the note; nor yet as in a sixth case‖ a warranty that the note is "*good.*" "Goodness," or "secureness," or susceptiveness of collection is not payment. One is satisfied by nothing but gold or silver money of the United States; each of the others is answered if, through any, the most difficult of the whole circle of legal resorts, you can *procure* payment.

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dcock v. Flem- 2 Devereux & tle. 470. oakly v. Riggs, Johnson, 69. rue v. Hard- . 3 Fairfield, umpston v. Mc ir. 1 Wendell, ; White v. ase, 13 id. 543. urtis v. Small- n, 14 id. 231, ard v. Heyl, 6 ney, 252, and e.

On *principle*, the position assumed by the defendant is untenable. A guarantor undertakes to see that the stipulation made by another is performed by that other, or else to perform it himself. It is not conditional, like the engagement of an endorser, but absolute. The guarantor signs in order to bind himself: an endorser to pass his interest. A surety undertakes to pass in the first instance the debt of another; a guarantor undertakes that *he will see it paid*, or pay it himself. His obligation may be secondary as to the person to pay: as to the fact of payment there is nothing secondary about it. "How," says Judge Cowen, for the Supreme Court

of New York in a case less strong than ours,* "how is this distinguishable from a direct signature as surety. A man writes: 'I promise that $100 shall be paid to A. or bearer.' Who would doubt that such a promise would be a good note? The use of the word 'guarantee,' or 'warrant,' or 'stipulate,' or 'covenant,' or other word importing an obligation does not vary the effect.....In one case† Fortescue said: 'I promise that J. J. or order shall receive £100,' is a good note. Suppose it to stand, 'shall receive of J. J.' or 'I will see that £100 is paid by J. J.' All this and the like is no more than saying 'I will pay so much by the hand of another.'"

* Lequeer v. Fr ser, 1 Hill, N. 256.

† Morice v. Lee Modern, 362–4.

On authority likewise, the case is with the plaintiff; for not being a question as to the construction of a statute, nor about real estate, nor about any thing having a permanent locality immoveable and intra-territorial in its nature, but concerning a mercantile instrument common in its use over the Union, and now in contest between citizens of different states, it is to be settled not by the local laws of Pennsylvania, but by authorities binding on *this* court, if there be any, or if there be none, then by the weight of reason and decison, as it stands upon a review of judicial opinion in general.‡

‡ Swift v. Tys 16 Peters, 1.

The tendency of cases has of late been to confine rather than to extend the operation of State jurisprudence.§

§ Vick v Lane Howard, 464.

If these positions be correct, then it is important that the construction of the plaintiff is denied to be law, in

I. VERMONT;‖ where "I will warrant him to pay

‖ Smith v. Ide Vermont, 290.

APRIL SESSIONS, 1846.

according to his agreement," is held absolute; such says the court, being the character which has been given to other like engagements by numerous adjudications.

Greed v. Hillhouse, 7 Connecticut, 523.

II. CONNECTICUT;* where "I guarantee the payment of this note within four years," is held absolute. "The defendant's guaranty," says the Chief Justice, "was absolute that the note should be paid within four years by the maker, or that he would pay it himself"†

* p. 523.

Allen v. Rightre, 20 Johnson, 365.

Squeer v. Prosser, 1 Hill, N. Y. 174.

III. NEW YORK;‡ where the same construction is given to similar words, and the correctness of it enforced on principles and by authority. These cases in New York with that in Connecticut were cases of negotiable paper, in regard to which it has been declared‡ that the engagement is less easy to be made absolute than in a case like ours, of an instrument not negotiable.

Woolley v. Sergeant, 3 Halsted, 187.

§ id.

IV. NEW JERSEY;§ where "I guaranty *the within*," (not "*payment* of the within," and therefore less strong than our case) was held an absolute engagement; the instrument guarantied not being negotiable paper.

Upham v. Prince, 12 Massachusetts, 14.

V. MASSACHUSETTS;‖ where "I guaranty the payment of this note within six months," was held to be an engagement that the note should be paid in six months, and the guarantor held liable as a common indorser.

In all the foregoing cases, except perhaps the last, the obligation was *so* absolute as not to require even

demand of the principal and notice of non-payment to the surety. Admitting these, however, to be necessary, an obligation either to exhaust all remedies against the principal, or to prove that he was in such a desperate state that no remedies would assist you, quite outstrips all that counsel in the foregoing cases thought of contending for. *Such* an obligation, it is believed is no where imposed except in Pennsylvania and now in Missouri. It has been assumed to be unnecessary by the highest judiciary of the country, when the point was not raised,* and decided to be so by the only inferiour ones in which my researches enable me to say that it was.†

We admit that there are cases where, unlike those above stated, guaranty even of *payment* has not been held absolute; that is to say, not *so* absolute as to dispense *with demand and notice;* but they are all either cases of

1. *Negotiable paper;*‡ some of the cases, so far as may be gathered from their language, going upon that distinction: or

2. General commercial guaranties or *letters of credit,* where it was doubtful whether the guaranty

* Douglass v. Reynolds, 7 Peters 114, case of a letter of credit, in which the writers bind themselves to be "responsible" for $8000, in case the principals fail "to do so," i. e. fail to "be responsible," not fail to PAY. The court while it held that no casus fœderis arose except after demand and notice, yet add, "*The creditors are not indeed bound to institute any legal proceedings against the debtor.*"

† Bank of New York v. Livingston, 2 Johnson's Cases, 409; Morris v. Wadsworth, 11 Wendell, 100.

‡ Greene v. Dodge, 2 Hammond, (Ohio) 430; Oxford Bank v. Haynes, 8 Pickering, 423; Talbot v. Gay, 18 id. 534; Sage v. Wilcox, 6 Connecticut, 81; Lewis v. Brewster, 2 McLean, 21; Foote v. Brown, id. 369.

April Sessions, 1846.

would be accepted, or, if accepted, doubtful when, or for what amount the guaranty was to be resorted to.*

Neither class of cases concerns us; for neither intimates that any thing more than demand and notice is necessary, matters which we have averred in a form not objected to. The cases which decide that demand and notice are unnecessary, decide every thing in our favour, while these last, which hold them necessary, decide nothing against us.

The Pennsylvania decisions on which reliance is placed by the other side, originate in an early ill-considered and unsupported dictum.† *Rudy* vs. *Wolf*‡ was the first decision, but there, for aught which appears, the bond was *overdue* when guarantied. *Johnson* vs. *Chapman*,§ must be admitted to be in point, but it goes much on the prior case; and there is visible in subsequent cases in later volumes, the seminal principle of doctrine at variance with what was held in that case.‖

† A. D. 1793, Addowes v. Niel, Dallas, 133. 16 Sergeant & Rawle, 79.

3 Pennsylvania Reports, 18.

* Mussey v. Rayner, 22 Pickering, 228; Douglass v. Reynolds, 7 Peters, 113; Rapelye v. Bailey, 3 Connecticut, 439; Reynolds v. Douglass, 12 Peters, 497; Adams v. Jones, id. 207; Tuckerman v. French, 7 Greenleaf, 115; Cremer v. Higginson, 1 Mason, 323; Bradley v. Cary, 8 Greenleaf, 234; Norton v. Eastman, 4 Greenleaf, 521; Howe v. Nikels, 22 Maine, 175; Craft v. Isham, 13 Connecticut, 28.

‖ McDoal v. Yeomans, 8 Watts, 361. A. wrote on the back of a note, "I warrant the within to be collectable;" the holder sued *him*, without having sued the maker, but as an excuse for want of suit, offered to prove that the maker was so utterly insolvent that an action would have been fruitless. The court decided that suit was unnecessary. "If the maker," says Gibson, C. J. "was insolvent, the contract was broken the instant it was made, and the guarantee had an immediate right of action in it. The words of a guarantor are to be taken as strongly against him as the sense will bear, tempered however by the circumstances of the occasion. To warrant that a debt is collectable, therefore, is to warrant that it is *legally demandable*, and that the debtor is of competent ability to answer it; *not that he will pay it when demanded by execution..... Where indeed, an action against the principal debtor is made a condition precedent by the terms of the guaranty, it must be prosecuted to execution; but that it was intended to be a condition must appear from some circumstance or expression in the contract.*"

APRIL SESSION 1846.

Against the D claration, Oct. 16 & 17th.

Mr. CLARKSON and Mr. MCILVAINE for the defendant. The *lex loci contractûs*, governs the constitution and effect of the contract; and we are relieved from difficulty in the case before us as to what is the *locus contractûs*, for the contract was made in Pennsylvania; the parties to it all resided there until after the laws of that State operated on their case; in Pennsylvania the subject matter of the contract was situate, and there it was, itself, to be performed. The same law which governs the constitution and effects of the contract governs likewise its discharge; and if the contract, owing to any omission of Parker, has never become operative, or is discharged, in Pennsylvania, it remains inoperative or is discharged every where.* On no other principle than the one here asserted could parties, all residing in the same State, contract safely. If a contract entered into by Pennsylvanians, in Pennsylvania, about property in that State, and on a subject thoroughly settled by its courts, is to be interpreted by the law of Vermont, or of Massachusetts, or of Florida, or Louisiana, or by a balance of authority struck by this court between conflicting laws of all the States,—by the law of England—or by the law as now first decided by this court, and till decided no law at all—it is obvious that injustice will be done in the majority of cases where the court passes upon contracts made between citizens of the same State which by accident or design afterwards get here.

In Cradock v. Armor, 10 Watts, 258. Cradock signed himself to a promissory note of one P. who engaged to "deliver meat at MY stall," "security for the fulfilment of the above," and was held a principal debtor.

* Burge on the Conflict of Laws, vol. 3, p. 874–85; Story on the same subject, § 330 to § 335; in which books the authorities are collected.

'RIL SESSIONS, 1846.

Against the Deration, Oct. 16th 17th.

The argument that the Federal judiciary respects nothing but State *statutes* or the construction of *them*, by the State courts, or the law of real property as settled in the State, is misapplied. That argument applies to cases where the parties to the contract were residents of different States, or the contract was to be performed in some State other than the one where it was made, or where, in short, there was no *lex loci contractûs* other than the *circuit* itself. But if any parties concerned in any matter brought here, have always been citizens of Pennsylvania; if the contract have reference to that State alone; if it was there made and was there to be executed; this court will enforce the law of Pennsylvania, no matter what may be the subject of the contract. It will enforce it because it is the ***lex loci contractûs***. We claim the benefit then, of a general maxim of law; one which all courts, in all civilized countries, apply, and apply quite independently of the rules which govern the Federal courts in their decisions respecting State statutes or the laws of real property.

Is, then, the effect of what Culvertson did, settled in the State of Pennsylvania where he did it?

From an early date, the word guaranty has had a restricted meaning in Pennsylvania: and in 1793, where B "guarantied" all A's "dealings" with C, the court said that it was by no means clear that C could call upon B, until he had failed in his endeavour to recover from A, or until A had become "*notoriously insolvent.*"* The spirit of this early dictum was strong enough to animate and govern all our subsequent law on this subject.

* Eddowes v. iell, 4 Dallas, 5.

"Which bond I stand security for the *payment* of," is not less strong language than that used by the defendant here; yet on the assignment of a *bond*, it has been held to amount to no more than an engagement that if the maker became *insolvent* and the holder used *due* and ordinary diligence, *then*, that the secondary liability should arise.* *Johnson* v. *Chapman*† is yet more in point. Johnson assigned and guarantied to Chapman a bond not yet due, as follows: "I do hereby assign and guaranty the *payment* of the within bond to C." &c. This is stronger than our case. Yet the court says: "If an obligee, on assigning a bond, enter into a covenant with the assignee to stand surety for its payment, this is an engagement to pay the money on the *insolvency of the obligor*, provided the assignee use due diligence to obtain payment from the obligor. ..... A demand of payment alone is not sufficient. It must be followed up with proof from which the jury can reasonably infer the insolvency of the obligor."‡ The law as settled in 1831 by this, the leading case on the subject in Pennsylvania, has not been overruled by any subsequent decision, nor in any way departed from, except as in *McDoal* v. *Yeomans*,§ to enlarge its spirit.

* Rudy v. W 16 S. & R. 79. is not clear fr the report of case, whether bond was not o due when it assigned.

† 3 Pennsylva Reports, 18.

‡ pp. 19, 20.

§ 8 Watts, 3

In construing a guaranty you will temper its terms by the circumstances of the contract.‖ Parker's debt was not yet due, and was *secured by mortgage*. The mortgage was the security of his debt, "and was the thing which was not to be affected or rendered less secure in its *ultimate* payment." Now by the laws of Pennsylvania,¶ you cannot foreclose a mortgage until a year and a day after the debt which it was

‖ Miller v. Ste art, 9 Wheaton 680.

¶ Act of 1705.

PRIL SESSIONS, 1846.

given to secure becomes due; and whether or not that "security" would be "rendered less secure in its ultimate payment," was a thing which could not possibly be ascertained until the mortgage had been foreclosed. Culvertson's contract arose, not upon the non-payment of the bond, but upon the failure of the security.

THE COURT. October 20th.

GRIER, J. The decision of the point here raised depends upon the effect of the contract declared on, *according to the laws of Pennsylvania*, the place of the contract.

The covenants, when taken in connexion with the recitals in the instrument, shew that it is not an original contract of suretyship, nor, like the guaranty of a promissory note, a contract to pay on a given day if the principal does not; but one of a secondary or ancillary sort;—for a new consideration, guarantying the sufficiency of certain securities held by the plaintiff, and their *ultimate* payment. Being thus collateral and conditional, it requires, in its essence, that the plaintiff should exhaust his remedies against the other parties before he comes upon the defendant.

The word used, it may be remarked, is "*guaranty;*" a word which in its enlarged sense, says Chancellor Kent,* is "a promise to answer for the payment of some debt, or the performance of some duty, in the case of the failure of another party who in the first instance is liable."

Com. vol. 3, p.

The duties and liabilities consequent upon such a contract, are settled in Pennsylvania, as will be seen by reference to the cases cited on the argu-

ment;—particularly by that of *Johnson* v. *Chapman*,* where the words of the contract much resemble those in the engagement before us. No case, so far as I am aware, has ever over-ruled this decision. APRIL SESSIONS 1846.

* 3 Pennsylvani Reports, 18.

It follows then that the plaintiff must aver in his declaration, and of course must prove on the trial, that he had used due diligence to enforce payment of both the bond and mortgage assigned to him by Wharton; or that Wharton was in such a situation—call it what you will—that further pursuit would have been fruitless. For want of this the declaration is fatally defective, and judgment must go against the plaintiff, who has committed the first errour, and, in this case, shews no cause of action.

NOTE.—No Judgment was entered, however, as the plaintiff's counsel immediately asked leave to amend his declaration, which he was allowed to do on payment of costs.

[APRIL SESSIONS, 1846. NO. 27. COMMON LAW DOCKET.]

UNITED STATES VS. ROBINSON ET. AL.

[EVIDENCE: MARSHAL'S BOND: STATUTORY CERTIFICATE.]

Where a statute, dispensing with common law proof of a writing, allows a certified copy to be evidence after certain acts previously performed in regard to the original, a copy certified so as not to shew that those acts have been previously performed is inadmissible.

This was an action of debt against sureties, brought on the official bond of B. late Marshal of the Western District of Pennsylvania. The declaration STATEMENT.

Nov. Sessions, 1846.

Statement.

was in the usual form with profert: the plea *non est factum*. The plaintiff offered in evidence, from the files of the Treasury at Washington, (where it had been sent in compliance with the rules of that department intended to secure the government against loss) a *copy* of the bond declared on, with a certificate from the clerk of this court, not under the seal of the court, that the same was "a true and faithful copy of the official bond," &c. but the certificate did not state nor shew that the bond had been *filed and recorded* in the clerk's office.* The competency of the copy being objected to on this account, the point was, whether or not it was admissible under an act of Congress on the subject of Marshal's bonds, which enacts that "*they shall be filed and recorded* in the office of the clerk of the District or Circuit Court," &c. and that "*copies thereof certified by the clerk under the seal of the court, shall be competent evidence*," &c.†

† Act of April 1th, 1806; § 2nd. eters's Laws, p. 2.

The Court.

Grier, J. Where the common law proof of a writing has been changed by statute, and copies substituted in the place of originals, it is settled that the mode of authentication required by the statute should be strictly pursued: and all that the act requires should be made to appear on the face of the new evidence. The legislature may establish rules of evidence in derogation of the common law; but the judicial power is limited to rules laid down in the statute.

The copy here offered has not such authentication as the act requires. The clerk does not certify that it is a copy of any instrument '*filed and recorded*'

* In point of fact it had been lost and had never been either filed or recorded.

Nov. Sessions, 1846.

THE COURT.

in his office. As a matter of fact in the case, it is said that he could not have truly given such a certificate. And yet undoubtedly both filing and recording are pre-requisites to his capacity to give a copy at all. It makes no difference that the copy is the original one filed in the Treasury office. If that department chooses to disregard settled rules of evidence, and to take as security against default copies which have no value as proof, it must do so. The court will not follow their precedent.

If the words of the statute, when compared with the form of this certificate, (sufficiently explained by admitted facts in case,) do not satisfy the mind, and a precedent be needed, precedent in point is at hand in a decision of the Supreme Court of Pennsylvania.* A statute of that State requires that official bonds of Sheriffs *should be "duly recorded by the recorder of deeds," and "when so taken and recorded, shall be by him endorsed as duly recorded, and forthwith transmitted to the Secretary of the Commonwealth,* who shall file the same in his office;" and enacts that "*copies thereof,* under the hand and seal of office of the said Secretary or recorder, shall be admitted as legal evidence," &c. A copy was offered "duly certified by the Secretary of the Commonwealth to be a true copy of the original which was filed in his office;" and it was held inadmissible on the plea of *non est factum;* the plea in this case.

* Young v. The Commonwealth, Binney, 113.

The paper is also defective in wanting the seal of the court.

THE PLAINTIFF WAS CALLED.

(AT PITTSBURGH: NOVEMBER TERM, 1846, NO. 17.)

STIMPSON VS. THE RAIL ROADS.

[DAMAGES: NEW TRIAL: FORCE OF VERDICT.]

A jury cannot allow the plaintiff in a patent case, as part of his actual damages, any expenditure for counsel fees or other charges, even though necessarily incurred to vindicate the rights given him by his patent, and though not taxable costs.

Where, however, a jury did make such allowance under a direction from the court, conceded afterwards to be erroneous, their verdict was sustained by way of an exception; the misdirection of the court not having been assigned as a reason for new trial, the expenditures having been proved to be paid, and the verdict having attained, though improperly, the same result nearly, that the court in its power to treble the damages, might have reached in a regular way.

APRIL SESSIONS, 1847.

STATEMENT.

Stimpson brought sixteen suits against different rail-road companies or proprietors for infringing his patent for rail-road curves. The validity of his patent having been settled by a previous decision, the only question in these cases was *the amount of damages;* which it was agreed should be assessed in all the cases by the same jury.

As part of the evidence of damages, the court, upon the authority of a decision of Judge Story,* and with considerable reluctance, allowed the plaintiff to prove the value of the time he had given, with the amount of the counsel fees and other expenses, not taxable costs, which he had necessarily paid in the prosecution of these sixteen suits: and in charging the jury, directed them, in the language of Judge Story, that "they were at liberty, if they saw fit, to allow the plaintiff as part of his actual damages any expenditures for counsel fees or other charges which

* Boston Manufacturing Co. v. Fiske, 2 Mason, 19.

were necessarily incurred to vindicate the rights derived under his patent, and are not taxable in the bill of costs." April Sessions 1847.

The verdicts which were for the plaintiff, shewed by their amounts that all these expenses had been assessed by the jury as damages.

After the verdicts, the defendants, on the one hand, moved for a new trial because the damages were excessive, though not because of the direction of the court on the subject of damages. The plaintiff, on the other hand, moved to treble these damages as already found.

In connexion with the last motion it is requisite to state that by an act of Congress* now repealed, it was enacted that any person infringing a patent "*shall* forfeit and pay, &c. a sum equal to the actual damages sustained by the patentee," and by a subsequent act† still in force, that where the verdict is for the plaintiff, "*it shall be in the power* of the court to render judgment for any sum above the amount found by such verdict as the *actual damages* sustained by the plaintiff, not exceeding three times the amount thereof, according to the circumstances of the case, with costs."

* Act of April 17, 1800; c. 25, § 3.

† Act of July 4, 1836; c. 357, § 14.

After full argument by Mr. W. L. Hirst and Mr. White for the plaintiff, and Mr. Clarkson and Mr. Saunders Lewis on the other side, both motions were now disposed of as follows by

GRIER, J. I do not think that excessive damages, the reason urged for a new trial in these cases, is sufficient to justify the court in granting the motion, it

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being conceded that the verdict was in accordance with the directions of the court. As the law formerly stood, where the court without any exercise of their discretion were compelled to treble the damages, cases might occur in which a court would feel it to be their duty to set aside a verdict because the damages were excessive. And even then, they would require a case which appealed strongly to their sense of justice, before they would disregard the opinion of twelve men on matters of fact which it was their peculiar province to decide. Since the act of 4th July, 1836, the court are not compelled to treble the actual damages assessed by the jury, but may increase them or not at their discretion within that limit. In the exercise of that discretion the court will judge for themselves, and will not increase the damages, if in their opinion the jury have already exceeded the proper measure.

THE COURT'S OPINION.

There was however a portion of our charge to the jury the correctness of which we doubted when we gave it, and which on more mature consideration we are ready to admit was erroneous. It was that which relates to the evidence of damages; where upon the authority of Mr. Justice Story, we directed the jury, not without an expression of some doubt as to the correctness of the law as so laid down, that "if they saw fit to allow the plaintiff as part of his actual damages, any expenditures for counsel fees or other charges, which are necessarily incurred to vindicate the rights derived under his patent and are not taxable in his bill of costs, they might say so."

If the counsel for the defendants had insisted on this errour as a ground for a new trial in these nume-

rous cases, we should have felt ourselves compelled to grant it. But as in the exercise of the discretion intrusted to us of increasing the damages, we may neutralise the effect of this errour, we think the ends of justice may be attained, though somewhat irregularly, without putting the parties to the expense and trouble incident to so many new trials. APRIL SESSIO. 1847. THE COURT' OPINION.

In thus disposing of both these motions, I will take occasion to state why I venture to differ from the very learned Judge on whose authority alone I was induced to give my instruction on this point to the jury.

I do not think that the practice of courts of admiralty, which Judge Story would seem to have had a good deal in his mind, affords any proper precedent for courts which are governed by the common law. Courts of admiralty proceed according to the principles of the civil law; and costs are awarded at the discretion of the Judge, and are paid by such parties and to such an extent as he may judge equitable and right according to the circumstances of each case. The rule of our law is different. There were no costs given at common law, but if the plaintiff did not prevail he was amerred *pro falso clamore*. If he did prevail then the defendant was *in misericordiâ* for his unjust detention of the plaintiff's right, and therefore was not punished with the *expensa litis* under that title. But it being thought exceeding hard that the plaintiff for the costs which he was out of pocket in obtaining his right, could not have any amends, the statute of Gloucester* was passed,

* 6 Ed. 1 Ch.

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which gave costs in all cases where the plaintiff recovered damages. This was the original of costs *de incremento;* for when the damages were found by the jury, the judges held themselves obliged to tax the moderate fees of counsel and attorneys that attended the cause.*

THE COURT'S OPINION.

* See Bacon's Abridgment. Tit. Costs. (A.)

Under the provisions of this statute, every court of common law has established a system of costs which are allowed to the party who succeeds in a cause, by way of amends for his expense and trouble in prosecuting or defending his suit. It may be true no doubt, and is especially so in this country (where the legislatures of the different States have so jealously reduced attorney's fee bills, and refused to allow the honorarium paid to counsel to be exacted from the losing party,) that the legal taxed costs are far below the real expenses incurred by the litigant. Yet it is all the law allows as *expensa litis.* If the jury may, "if they see fit," allow counsel fees and expenses as part of the actual damages incurred by the plaintiff, and then the court add legal costs *de incremento,* the defendant may truly be said to be *in misericordiâ,* being at the mercy both of court and jury.

In courts governed by the civil law, if the court may give costs and expenses according to their discretion to the plaintiff, they can also exercise the same discretion in favour of the defendant when he has been unjustly harrassed. If the jury can exercise this wide discretion of giving incremental costs to a plaintiff under the name of actual damages, why should they not be allowed to give them to the defendant when he succeeds? He has certainly as good a right to them as the plaintiff, both in law and

equity. On every principle of morals a plaintiff would be as liable to punishment *pro falso clamore*, as the defendant, for the unjust detention of the plaintiff's right. If this principle be introduced from the civil law, both parties should have the benefit of it. A defendant should not be left to contend with such odds against him. In actions of debt, covenant, assumpsit, &c. where the plaintiff always recovers his "*actual damages*," he can recover but legal costs as compensation for his expenditure in the suit, and as punishment to defendant for his unjust detention of the debt. His equity is no greater, nor his injury of a higher order, where his action is for a trespass or a tort. It is a moral offence of no higher nature to infringe a patent, than to detain a just debt. Why then shall the law give the plaintiff such an advantage over the defendant in the one case, and not in the other? There is certainly nothing in the act of Congress, or in the phrase "actual damages," which it uses, to countenance the doctrine. The term "actual damages," cannot be construed to mean exemplary, vindictive, or punitory damages inflicted by way of smart-money, or punishment of the defendant for fraudulent, malicious or outrageous wrongs.

THE COURT'S OPINION.

Before 1836, the law compelled the court to treble the "actual damages" found by the jury. This was intended, no doubt, to punish the defendant, and thus indirectly remunerate the plaintiff for his extra expenditures in establishing his patent. This law was found to act unequally, for defendants were often found to have the prior invention and to have been unjustly harrassed by the plaintiff, and yet they re-

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covered nothing but costs. Often where the plaintiff recovered, the contention was a *bona fide* one, on the respective interests or titles of the parties: it was, therefore, obviously unjust in such a contest that the plaintiff should recover treble damages, if he succeeded, while the defendant could recover nothing. It was for this reason that the act of 1836 submitted the question of trebling the damages to the discretion of the court, and thus left the parties to contend on a more equal field. The defendant suffers the infliction of vindictive damages only when the court are of opinion he has acted unreasonably or oppressively.

THE COURT'S OPINION.

It is a well settled doctrine of the common law, though somewhat disputed of late,* that a jury in actions of trespass or tort may inflict exemplary or vindictive damages upon a defendant, having in view the enormity of defendant's conduct rather than compensation to the plaintiff. Indeed in many actions such as slander, libel, seduction, &c. there is no measure of damages by which they can be given as compensation for an injury, but are inflicted wholly with a view to punish, and make an example of the defendants. But in no case is the degree of the defendant's delinquency measured by the expenses of the plaintiff in prosecuting the suit. The plaintiff, it is true, is thus indirectly compensated for his expenses, but it is not this measure of defendant's punishment, nor a necessary element in its infliction.

Law Reporter, v. 10, p. 49.

The doctrine for which we here contend is supported by the best authority. *Arcambel* v. *Wiseman*,† which Judge Story admits is in conflict with him,

3 Dallas, 306.

carried it so far as to apply it to cases of admiralty, and Judge Story's own decision was a complete reversal of a rule which he had himself previously established on the authority of that case. In a Massachusetts case,* more recent than any of these decisions, Chief Justice SHAW, after remarking upon the notion that had once prevailed on the subject, says:—"It is now *well settled* that even in an action of trespass or other action sounding in damages, the counsel fees and other expenses of prosecuting the suit not included in the taxed costs, cannot be taken into consideration in assessing damages." And in another† in New York, Chief Justice NEILSON says:—"The charge as to expenses beyond taxable costs and counsel fees, in conducting the suit, as a particular item of damages to be taken into the account, I am also inclined to think was erroneous. These have been fixed by law, which is as applicable to cases sounding in damages as debt." He refers to the case in Massachusetts, and approves of it "on principle."

* Barnard v. P 21 Pickering, 382.

† Lincoln v. Saratoga R R. 23 Wendell, 435.

A case in Connecticut,‡ I am aware is an apparent authority for a contrary doctrine. But the main question discussed in the opinion of the court, is whether a jury may give vindictive or exemplary damages in an action for a tort, against a defendant who has acted with gross negligence: and the proposition that the plaintiff's counsel fees and expenses should be assumed as the exact measure of the defendant's punishment, seems to have been founded on some custom or practice peculiar to the State of Connecticut, and not on any principle of the common law. The court was not unanimous, and Mr. Justice Waite who dissented from the majority, uses

‡ Levesly v. Bi nell, 15 Conne cut, 226.

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some arguments on this point which I have not seen answered.

THE COURT'S OPINION.

Convinced, therefore, that the doctrine I laid down to the jury on the trial of these cases, is not founded on the well established principles of the common law, and that it would work inequality and injustice, I take this opportunity to retract it: and say that hereafter, such evidence as was then given, will not be objected to, if permitted to go to the jury, nor will the court instruct the jury, "that they are at liberty if *they see fit*, to allow the plaintiff as part of his actual damages, any expenditures for counsel fees, &c. incurred to vindicate his rights and not taxable in the bill of costs." If such expenditures are proper elements of *actual* damages, the jury should have no discretion to omit them: if not, the jury should not be permitted to add them. It is a principle of too much importance to be submitted to their arbitrary discretion. In almost every instance where I have seen it done, they have assessed more than treble the amount of actual damages, while the court have been called on to add to the injustice, by trebling them again. Patentees should be protected liberally by the law: but their wrongs should not be made subject for speculation and extortion.

BOTH RULES DISMISSED.

THE UNITED STATES VS. ARCHER'S EXECUTORS.

[EQUITABLE RELIEF AGAINST SURETIES.]

Where a party whose obligation to pay arises from his contract only—as a surety—is discharged at law, equity will not extend his liability in a case where there has been neither fraud nor accident.

[This decision is in conflict with The *United States* vs. *Cushman*, (2d Sumner 426,) which is denied in the 3d Circuit to be law.]

Oct. Sessions 1847.

Statement.

Archer in his life time became bound as "*surety*" to the United States for the payment by Mifflin and another, as "*principals*" of certain *joint and several* bonds. Suits were brought jointly against all the obligors and judgment so obtained on them; but before satisfaction was procured the principals became insolvent and the *surety died.* The present suits, *bills in equity*, were brought after the surety's death to recover the amount of the judgments *out of his estate.* And whether the United States could so recover was the question.

The act of Congress under which the bonds were given, enacts* that when due, the collector, shall prosecute them "by action or suit *at law*:" and the same section gives any surety who shall pay the debt of his principal a right to proceed on the bond "*in law or equity*," &c.

*March 2, 1799 § 65.

For the United States, Oct. 21.

Mr. Pettit, D. A. for the United States, relied principally on a case decided in 1836, by Judge Story,† the essential facts of which were the same as those of the present case. The argument of that Judge is, in its outline, as follows: He admits‡ that generally speaking, equity will not make a surety

† United States v Cushman, 2 Sumner, 426.

‡ id. p. 434-5.

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liable when discharged at law, but seems to confine the doctrine to cases "where the plaintiff seeks to have a bond *joint* in its form, reformed so as to make it "*joint and several.*"* No reform was needed here. And though as between the obligors, one might be surety only, and another principal, yet as towards the *United States*, "they were *all principal debtors*, jointly and severally liable *as such* by the general principles of law as well as *in equity*," a position for which he refers to *Berg* v. *Radcliff*.† The defendants' argument supposed, that if a bond joint and several in form is sued against all the obligors, and a joint judgment is obtained thereon,‡ the joint judgment though unsatisfied, *ipso facto*, extinguished the several as well as the joint obligation ex contractu;" a doctrine for which "even *at law*" no authority had been cited, and which it would be difficult to maintain on principle. His Honour says on the contrary,§ that "when a party enters into a joint and several obligation, he, *in effect, agrees that he will be liable to a joint action and to a several action* for the debt; and, if so, then a joint judgment can be no bar to a several suit, if that judgment remains unsatisfied. The defect of the opposing argument," he continues, is, "that it supposes that the obligee has *an election* only of the one remedy or of the other; and that by electing a joint suit he waves his right to maintain a several suit;" which he takes "not to be a sound legal interpretation of the contract." The remedies, he says, are *concurrent*, and he knew "of no principle of law, which would have prevented the plaintiffs from bringing *a joint suit and a several suit on the bond at the same*

or the United tates, Oct. 21st.

Inited States v. ushman, 2Sum- ir, 434–5.

ohnson's Chan- cery, 302.

Sumner, 436.

§ id. 440.

time, and proceeding therein pari passu." His Honour cites for authority, five cases: *Higgins' case*,* saying however that it is "not directly in point to the present;" *Dyke* v. *Mercer*,† where "again the party sued was not a party to the former judgment;" *Sheehy* v. *Mandeville*,‡ "also distinguishable from the case at the bar," though a "remark of the court seems to apply in principle;" *Ward* v. *Johnson*§ "also distinguishable;" and finally *Lechmere* v. *Fletcher*,‖ where "again the facts did not call for any decision of the precise point now before this court."

* 6 Reports,

† 2 Shower, 3

‡ 6 Cranch, 2

§ 13 Massachus 148.

‖ 1 Crompton Meeson, 62

"But it was immaterial," he concludes, "whether a suit could be maintained at law or not. The joint contracts of debtors having a common interest are in equity treated as joint and several, wherever the joint remedy at law fails to enable the plaintiff to obtain satisfaction;" (as in the case of a deceased partner.) "A *fortiori* the same principle will be applied, &c. in the case of a contract in form joint and several where the survivors are insolvent..... *It is against conscience that a party who has severally agreed to pay the whole debt*, should by the mere accident of his own death, deprive the creditor of all remedy against his assets. So Courts of Equity have always treated the matter, and the present case is but a new application of a very old and well established doctrine."¶.... His Honour refers to two cases decided by *Sir William Grant*,** *as giving a very clear exposition of the doctrine and of the grounds of equitable interference*, and cites also *Rawstone* v. *Parr*,†† "though the case was finally disposed of on another ground."

For the Uni States, Oct. 2

¶ Story's C on Equity Ju §676 & n. I 164 & n. n.

** Devayne Noble, &c. 1 rivale, 564; S ner v. Powe Merivale, 30

†† 3 Russell,

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Mr. MEREDITH and Mr. MILES for the defendant: The bonds being joint and several, the U. S. could sue them either jointly or severally, but cannot sue them in two ways. "It is at the *election* of the obligee," says Sergeant Williams,* in speaking "of actions upon joint or several bonds," "to consider such a bond a joint OR several one. If he sues one or each of the obligors, *he acts upon it as a several bond:* if he sues *all* of them he proceeds upon it as a *joint* bond." .... "If two are jointly and severally bound," says Bacon†, "and there is judgment on a joint action against both, the execution must be joint against both; for though the plaintiff *might* have sued them severally, *yet by sueing them jointly he has made his election.*" .... "If the contract is joint as well as several," says a recent writer,‡ "the creditor may sue the parties jointly: but *if he elects to sue them jointly, he cannot sue them severally*, for the pendency of one suit may be pleaded in abatement of the other."

For the Surety, Oct. 21st & 22d.

* Cabell v. Williams, 1 Saunders, 291, n. 4.

† Abridgment: Tit. Obligation, D. 4.

‡ Pitman: On Principal & Surety, 84, quoting Lord Talbot as *post*.

Adjudged cases are to the same effect. "The cause of action, said the Court of K. B. in 1607,§ when the principle is clearly found, "being against *divers*, for which damages uncertain are recoverable, and the plaintiff having judgment against one person for damages certain, that which was uncertain before, is reduced *in rem judicatam* and to certainty, *which takes away the action against the others.*" The precise doctrine was assumed true, as of course, by Lord Talbot in 1735,‖ and was conceded by opposing counsel as of course: "At law," says the Chancellor, "when A. and B. are bound jointly and severally to J. S., if J. S., sue A. and B. severally, he cannot

§ Brown v. Wootton, Cro. Jac. 73-4.

‖ Ex parte Rowlandson, 3 Peere Williams, 406.

sue them jointly; and on the contrary, if he sues them jointly, he cannot sue them severally, but one action may be pleaded in abatement of the other." The counsel against whom the decree was, admit the doctrine, and apply it to the very case where "at law two men are bound jointly and severally *in a bond.*" In 1812, Lord Eldon illustrates* an argument in bankruptcy by saying, "under a joint and several bond, the obligee, though he might have *several* executions, could not bring a *joint* and *also two several* actions. The point was adjudged, precisely, in Pennsylvaina A. D. 1825,† on general principles, in a case, too, "where the court *felt a strong inclination to assist the plaintiff*," but could not, "because upon looking well into it *the law was too strong against them.*" After bringing a joint action, said C J. Tilghman in that case, "the bond is to be taken as joint only, and *can never after be proceeded on as a several obligation.*" This case has been twice affirmed in the same State.‡ In *Minor* v. *The Mechanicks' Bank*,§ in the Supreme Court of the United States, Judge Story says, on "a joint and several bond, the plaintiff might have commenced suit against *each* of the obligors severally, OR a joint suit against them *all.*" He has no right to commence a suit against any intermediate number. "He must SUE ONE OR ALL."

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* 1 Vesey & Beams, 65, ex parte Brown.

† Downey v. The F. & M. Bk. 13 S. & R. 289.

‡ Walter v. Ginrich, 2 Watts, 204, A. D. 1834: Stoner v. Stroman, 9 Watts & Sergeant 85, A. D. 1845.

§ 1 Peters 37, A. D. 1828.

Certainly then, the remedies are not concurrent as supposed‖ by Mr. Justice Story, and there is a settled principle of law, distinctly enunciated by Talbot and Eldon—asserted from the bench of the Supreme Court by Judge Story—and solemnly decided in Pennsylvania, which does prevent a plaintiff "from

‖ United States v. Cushman, 2 Sumner, 438.

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bringing a joint and several suit at the same time, and proceeding thereon *pari passu*."*

Of the five authorities in the *United States* v. *Sumner*, every one is admitted to be *not* in point: their language, only, or supposed principle is relied on. The first, *Higgins*' case,† decides "that where two are bound jointly and *severally*, and the obligee has judgment against *one* of them, he may yet sue the *other*."‡ Of course he may. In the second, *Dyke* v. *Mercer*.§ "two men were bound in a bond to J. S.; one was sued, who pleaded that his co-obligor had been sued to judgment, and thereupon a fi. fa. issued and the sheriff levied the money. Upon demurrer it was held that the plea was bad, it not averring any satisfaction."‖ What application has this? the case not showing at all, that the bond was *joint merely*, and it having been no doubt joint and several. In the third, *Sheehy* v. *Mandeville* & *Jameson*¶ judgment had been obtained against J. who was afterwards discharged as an insolvent; under a local law of course, the terms of which are not stated in the report. The plaintiff then discovering that M. was originally liable with him (as a secret partner,) brought a *joint* suit against J. *and* M. J. was discharged from liability under this suit, either by *nolle prosequi* or something equivalent to it, and judgment given against *M. alone*.** The case is a peculiar one, turning on the effect of a discharge of one of the defendants under a local law whose provisions are not stated, and is cited by Judge Story for no more than that the several judgment was no bar to a joint action, "*at least as to the partner not sued before*."†† Even if the case decided, that after a *several* judg-

* United States v. Cushman, 2 Sumner, 438.

† 6 Reports, 44.

‡ United States v. Cushman, 2 Sumner, 437.

§ 2 Shower, 393.

‖ United States v. Cushman, 2 Sumner, 438.

¶ 6 Cranch, 253

** See the case in 7 Cranch, 208, where it came again, on judgment against *Mandeville*, alone.

†† See the case well explained by Mr. H. B. Wallace, 1 Smith's Leading Cases, 337, Phil. 1847. *note*.

ment against one partner, a *joint* judgment could be had against *both*, it would be but the converse of the proposition for which it is cited: and would be at variance with the highest decisions made in full view of it, both in this country and England.* The fourth case *Ward* v. *Johnson*,† is more than distinguishable. It is in principle at variance: "suit was brought against one partner upon a partnership contract, and afterwards a joint suit against both..... The court held that... "the joint suit was *not* maintainable."‡ The last case is *Lechmere* v. *Fletcher*,§ "In that case there was an original partnership debt on which a joint suit was brought: ..... one of the defendants had a verdict in his favour, and the other a verdict and judgment against him. Afterwards the plaintiff brought a *sole* suit against the defendant, who had the verdict in his favour upon a *distinct promise made to him before the former suit was brought*,‖ and had a judgment. That was right enough, but it has no application either to the case of the *United States* v. *Cushman* or to this.

† 13 Massachusetts 148.

‡ United States v. Cushman, 2 Sumner, 438.

§ Crompton & Meeson, 623.

‖ United States v. Cushman, 2 Sumner, 439.

All the authorities cited by Judge Story are thus disposed of: not one of them applies.

* To Willings v. Consequa, in this Circuit (1 Peters' Circuit Court Reports, 301, A. D. 1816,) by Judge Washington, who assisted in the determination, and does not refer to it as deciding differently from him: To Ward v. Johnson, in Massachusetts, (13 Massachusetts, 151, A. D. 1816,) in which the case is explained, and a decision made in conflict with it if held generally. In New York to Penny v. Martin, (4 Johnson's Chancery 566, A. D. 1820,) by the Chancellor, (Kent;) and at law to *Robertson* v. *Smith*, (18 Johnson, 459, A. D. 1821: and see Peters v. Sanford, same court, 1 Denio, 224, A. D. 1845.) In Pennsylvania to Smith v. Black, (9 Sergeant & Rawle, 142, A. D. 1822,) and to Anderson v. Levan, (1 Watts & Sergeant, 339, A. D. 1841,) and, finally, in England to King v. Hoare, (13 Meeson & Welsby, 494, A. D. 1844,) in which case, as in Robertson v. Smith, it is particularly adverted to, and its reasoning pronounced not satisfactory.

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The question then is simply: Will Equity make a *surety* liable, who is discharged at law? *it being conceded that the surety has received no personal benefit from his bond, and that there has been neither fraud, ignorance, mistake or inadvertence in the case.*

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That it will relieve, where through fraud or accident even a surety is discharged, is true: and though there have been neither fraud nor accident, it also will against any co-obligor, who, though discharged at law, has yet, *himself had the benefit* of the contract which he seeks to evade.*

* Simpson v. Vaughan, 2 Atkins, 31; Bishop v. Church, 2 Vesey, 100; Thomas v. Frazer, 3 Vesey, jr. 399; Hunt v. Rousmanier, 1 Peters, 16.

But as early as 1693, the Lord Keeper declared,† that as a general rule, "he would *not* charge the sureties further than they were answerable at law," and dismissed a bill seeking so to charge them. In 1735, Lord Talbot refused‡ to hold a husband liable in Equity for his wife's debts, he being discharged at law; this "though he had a large fortune with her." In 1795, the liability of a surety was carefully considered in the Court of Appeals of Virginia,§ where the accurate reporter's syllabus is: "If a bond be made joint without fraud or mistake, Equity will *not* charge the executor of the *surety*, who was discharged at law by his death in the lifetime of the principal. Aliter, *if the lending* had been to *both*." "The surety," says‖ the President of the Court, "received no benefit from the loan: he was bound by no contract, express or implied, *antecedent to the bond: he* was under no *moral* obligation to pay, and *of course* Equity would not bind him further than he was bound at law." *Sumner* v. *Powell*,¶ to which the *United States* v. *Cushman* refers,** as giving "a very clear exposition" of the

† Radcliffe v. Graves, 1 Vernon, 196; S. C. 1 Equity Cases Abridged, 93 (ch. xiii. K. pl. 3.)

‡ Herd v. Stanford, Forrester, 173; S C. 3 Wilson, 409.

§ Minge's Executor v. Field, 2 Washington, 136.

‖ id. 140.

¶ 2 Merivale, 29, A. D 1816.

** 2 Sumner, 442.

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doctrine of Equity, was in effect this: A. and B. were partners. The *name* of C. afterwards appeared as a partner, but he never *took any share of the profits*, nor received any thing beyond a fixed salary. B. embezzled certain funds and applied them to the partnership purposes, both A. and C. being ignorant of his act. A. afterwards retired from the firm, taking a *joint* covenant of indemnity from B. and C. against claims upon him as a partner. C. died, B. surviving insolvent. A. having been made to account as a partner for B's embezzlement, filed a bill against C's. executors to have indemnity under the covenant which he sought to have treated as joint and *several.* But Sir William Grant refused to give it, because C. had received no *benefit* from the embezzlement, and his obligation to indemnify existing—not in virtue of any 'antecedent liability'—but only as matter of 'arbitrary convention,' its extent could be measured only by the words in which it is conceived. Chief Justice Tilghman of Pennsylvania, applies* the doctrine in favour of a surety. He declares "that going as far as equity has done to follow the assets of a joint debtor, is carrying the matter far enough," and that "*no case can be shewn where equity has charged the "estate of a surety which has been discharged at law.*" He examines the older authorities, especially a case mentioned by Lord Hardwicke in *Primrose* v. *Bromley*,† which has been misunderstood, and shews that it was the case of a joint *beneficiary:* and his general positions about sureties are exactly confirmed in the Court of Appeals in Maryland.‡ Where a creditor had obtained judgment against certain known partners, being ignorant of

* Weaver v. Shryhock, 6 Sergeant & Rawle, 264, A. D. 1820, confirmed in Kennedy v. Carpenter, 2 Wharton, 344.

† 1 Atkyns, 90.

‡ Waters v. Riley, 2 Harris & Gill, 305, A. D. 1828, and see Story's Equity, § 164.

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three *dormant ones*, Chancellor Kent refused* *to* lend equitable aid to reach them.

* Penny v. Martin, 6 Johnson's Chancery, 566.

Admit that these cases were of joint bonds or joint debts not of joint and several ones, how is that important here? the *several* virtue of the bond, having been merged, destroyed and surrendered by the obligor himself, who had them all in his own hands—for the preferred and higher security of a *joint judgment*. The bond has no existence at all as a security, after the judgment. To use the language of Ventris,† "it is *drowned* in the judgment," and the surety is bound in this case by a *joint* judgment only, just as in the cases cited he was by a joint *bond:* and in both he has been discharged. The errour of Judge Story's conclusion, springs from a fact assumed by him in his outset as true, but which in fact, is wholly untrue, "that where an obligation is joint and several the remedies are concurrent:" They are "elective." One of his positions stated as an argument, takes the whole matter for granted: "When a party" he says,‡ "enters into a joint and several obligation, he *in effect* agrees that he will be liable to a joint action AND to a several one." But this is not 'so.' He agrees to be bound just so far and in just such a manner as, in law or equity, he *is* bound, neither further nor otherwise: and to say that in either law or equity he is bound severally after the joint judgment—what is that but to assume the question in controversy?

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† Vol. ii. p. 348.

‡ United States v. Cushman, 2 Sumner, 440.

In *Berg* v. *Radcliffe*,§ a testator devised his real estate to pay debts, some of which arose from suretyship. He had never been discharged from them in law or equity, and in directing his executors to pay them Chancellor Kent only enforced a trust which the testator had himself created.

§ 6 Johnson's Chancery, 302, relied on by Judge Story, *see ante.* p. 174.

Oct. Sessions, 1847.

Mr. Pettit in reply: Every one of the cases cited on the other side were of *joint* debts merely. Those in Virginia,* Maryland† and Pennsylvania,‡ of *joint* bonds; and those before Sir William Grant§ and Chancellor Kent,‖ of partnership or *joint* debts. In the Maryland case, the Chief Justice notes the circumstance that the bond was *intentionally* required to be "joint" and not "joint and *several.*" Now the whole point of Judge Story's decision *turns* on the distinction between bonds *merely* joint and those that are joint and *several:* Of course none of the cases apply, and the doctrine of them all is elsewhere admitted by Judge Story himself.¶

* Minge's Executor v. Field, 2 Washington, 136.

† Waters v. Riley, 2 Harris & Gill, 305.

‡ Weaver v. Shryhock, 6 Sergeant & Rawle, 264.

§ Sumner v. Powell, 2 Merivale, 29.

‖ Penny v. Martin, 6 Johnson's Chancery Reports, 566.

¶ Commentaries on Equity Jurisprudence, §§162, 163, 164.

When in making a bond, the debtor super-adds a "several" to his joint liability, who can say that nothing is meant by the addition? It undoubtedly "*is* against conscience," as Judge Story says,** that a party who has *severally* agreed to pay the whole debt, should by the mere accident of his own death deprive the creditor of all remedy against his assets. For the creditor looked to him severally, and as a surety trusted him principally, perhaps altogether. Admit that *at law* the remedies are but elective. This present suit is an application for equitable aid: and we ask the court to look behind the judgment at that "antecedent liability" so much spoken of on the other side, which the bond originally gave, and of which through an accident of the law the party has been deprived.

** United States v. Cushman, 2 Sumner, 441.

The Court's Opinion.

Grier, J. That the case of the *United States* v. *Cushman,*†† decided by the late Justice Story, and pressed upon us in behalf of the United States, is, in

†† 2 Sumner, 426.

Oct. Sessions, 1847.

all material facts, similar to the present cannot be denied; and such is the reverence entertained by this court for the learned Judge who decided it, that the weight of his single name would have been amply sufficient to draw assent from our minds in a case otherwise susceptible of a doubt.

The Court's Opinion.

But as all other authority is, in our opinion, to be placed in the opposite scale, we have ventured, though with diffidence, to dissent from his conclusions.

1st. The allegation that an obligee who has obtained a joint judgment against all the obligors, may afterwards sue them or their representatives severally, assumes too much for the plaintiff's case. If such be the law, the plaintiff has ample remedy at law, without invoking the aid of a Court of Equity.

But the law appears to be well settled, that if two or more are bound jointly and severally, the obligee may *elect* to sue them jointly or severally. But having once made his election and obtained a joint judgment, his bond is merged in the judgment "*quia transit in rem judicatam.*" Indeed it is essential to the idea of election that the obligee cannot have both a joint and several action: and no case can be found to countenance the doctrine* that he can.

7 United States v. Cushman, 2 Sumner, 310; Reed v. Garven's Executors, 7 Sergeant & Rawle, 354; Stiles v. Brock, 11 Pennsylvania State, 215; Erwin's Lessee v. Dundass, 4 Howard, 77.

2d. That the death of the defendant's testator after judgment discharged his assets, and that no action at law lay against him, the bill impliedly admits, and has not and cannot be denied.†

* Brown v. Wootton, Cro. Jac. 73; Bacon's Abridg. "Obligation," D. 4; Streatfield v. Halliday, 3 Durnford & East, 782; Hurlstone on Bonds, 97; Minor v. The Mechanicks Bank, 1 Peters, 73; Ex parte Brown, 1 Vesey & Beames, 65; Pitman on Principal & Surety, 85; Downey v. The Farmers & Mechanicks Bank, 13 Sergeant & Rawle, 288; Walter v. Ginrich, 2 Watts, 204; Stoner v. Stroman, 9 Watts & Sergeant, 88; Pollexfen, 641; 2 Ventris, 348.

Oct. Sessions, 1847.

The Court's Opinion.

3d. It cannot be disputed that equity will reform an instrument even as against a surety, where there has been fraud or mistake; and give a remedy against the estate of a deceased joint debtor, where he has been personally benefited by the consideration of the contract.* But that it will give assistance as against a mere surety, who has received no personal benefit, when his liability is discharged at law, is a proposition not only unsupported by precedent, but denied by many authoritative decisions. To some of these it will be proper more particularly to refer.

* Story's Equity, §§ 162, 163, 164, 676; Primrose v. Bromley, 1 Atkyns, 90; Simpson v. Vaughan, 2 Atkyns, 31; Bishop v. Church, 2 Vesey, 101-371; Devaynes v. Noble, 1 Merivale, 568; Sumner v. Powell, 2 Merrivale, 36; Thomas v. Frazier, 3 Vesey, jr. 399.

In *Hunt v. Rousmanier*,† the court (referring to the cases last above quoted,) say, "the cases alluded to, are those in which equity has afforded relief against the representatives of a deceased obligor in a joint bond *given for money lent to both the obligors*, although such representatives were discharged at law. The principle upon which these cases manifestly proceed, is, that the money being lent to both, the law raises a promise in both to pay, and equity considers the security of the bond as being intended by the parties to be co-extensive with this implied contract by both to pay the debt."

† 1 Peters, 16.

The Court of Appeals of Maryland,‡ in reference to this subject, declare the general rule to be, "that where the remedy at law is gone, Chancery will not revive it, in the absence of any accident, fraud or mistake; to which the case of a bond where all are principals, has been held to be an exception, each being equally benefited, and under an equal moral obligation to pay the debt, independent of the bond, to which equity relates back, when the remedy on the bond at law is gone. But in case of a surety who

‡ Waters v. Riley, 2 Harris, & Gill, 305.

Oct. Sessions, 1847.

The Court's Opinion.

is bound only by the bond itself, and is not under the same moral obligation to pay, equity will not interfere to charge him beyond his legal liability."

The same doctrine is fully recognized by the Supreme Court of Pennsylvania in several cases, and by the Court of Appeals in Virginia."*

* Weaver v. Shryhock, 5 Sergeant & Rawle, 264; Kennedy v. Carpenter, 2 Wharto, 361; Harrison v. Fields' Exrs. 2 Washington, 136.

This case cannot be distinguished from those I have quoted, on the ground of the United States being party plaintiff: for the same rules of contract are applicable where the sovereign is a party as between individuals.† On the contrary, the act of Congress‡ in pursuance of which the bonds in this case were given, while it gives a surety who has paid the bond a remedy both at *law and equity* against his principal, requires on behalf of the government, that prosecutions for the recovery of the money "*shall be by action or suit at law.*" Now while I doubt not but that the assistance of a Court of Equity, as ancillary to a Court of Law may be invoked to obtain a remedy where there is a *legal* obligation to pay the bond; it is plain that the statute does not provide for the enforcement of a mere equitable right in favour of the United States, where their obligations are discharged at law, or claim for them any privilege or prerogative beyond any other corporation or individual.

† Hunter v. The United States, 5 Peters 174.

‡ Of March 2, 1799. § 65

A surety in a bond to the United States, is under no higher legal or moral obligation to pay the money than if an individual were the obligee. And the extent of that obligation in common cases, both at law and equity is well established by decisions of tribunals of the highest authority. I do not think

the court is bound to depart arbitrarily from all precedent, or to establish new and anomalous principles, to suit the necessities of the government. Congress may alter the law, if they see fit, but it does not become the court to legislate when they have omitted it. OCT. SESSIONS, 1847.

BILLS DISMISSED.

[OCTOBER SESSIONS 1843, NOS. 3 AND 4, EQUITY DOCKET.]

LOWE VS. THE CANAL BOAT BENJAMIN.

[COSTS CONNECTED WITH WANT OF JURISDICTION.]

Where a libel is dismissed for want of jurisdiction apparent on its face, *costs of suit* cannot be awarded to either party, though the *costs of the motion to dismiss* may be to the party which succeeds. But where on the face of the libel the court has jurisdiction, and the want of it though really existing, is disclosed only by the defendant's answer, and the evidence taken in the case, *costs of suit* may be awarded to the party who succeeds.

Lowe had libelled the canal boat Benjamin in the District Court. The *libel was in the ordinary form*, and set forth, in the usual general words, "the ebb and flow of the tide within the admiralty and maritime jurisdiction," &c. and such navigation as was requisite to give the court jurisdiction of the case. The *answer* denied the jurisdiction, and stated such facts as to the course of the vessel's voyages, and as to the sort of water that she navigated, as, if true, went to oust the jurisdiction. *Evidence was accordingly taken upon these facts*, and the jurisdiction was made one point of the case both in the District Court and here, APRIL SESSIONS, 1847.

STATEMENT.

April Sessions, 1847. where it came from that court by appeal. The District Court decided in favour of the jurisdiction. This court, decided against it, and dismissed the libel for want of jurisdiction.

May 1st. After this dismissal, Mr. Harris for the defendant moved for costs of the suit. Mr. Griscom for the June 7th. libellant, opposed the motion on the ground that as the libel had been dismissed because the court had *no jurisdiction of the case*, it was impossible to give costs; for that these could not be given unless the court had jurisdiction over the parties,* which it had been already decided in this very case that they had not.

* M'Iver v. Wattles, 9 Wheaton, 650.

The Court's Opinion. Grier, J. It is well settled that where a case is dismissed for want of jurisdiction *apparent on the face of the record*, the court will award costs to neither party: And this for the reason that the court manifestly having no jurisdiction cannot inquire into the facts, and of course can give no judgment. While, at the same time, as the parties are in court for the purposes of the suit, the court will order the costs of the motion, as distinguished from costs of the suit or costs generally, to be paid to the party moving.†

† Ex parte Davis & Sowle, 5 Cowen, 33; People v. The Judges, 7th id. 423.

But where on the shewing of the plaintiff's writ and declaration the court has *apparent* jurisdiction of the subject matter of the cause, and the want of jurisdiction is first disclosed by *the plea and evidence*, the defendant ought to have judgment for his costs in the same manner as if he had succeeded on the trial by the interposition of any other plea: And this for the reason that the parties are in court on the issue, and judgment has been rendered thereon.

The case before us is of the latter sort: The libel shewed no want of jurisdiction. *It*, on the contrary, was regular enough, and the want of jurisdiction was first stated in the answer. Jurisdiction was one of the issues tried, and the subject of evidence and argument on both sides, as well in the District Court as here. The parties were before the court, which had jurisdiction of the subject thus presented to them for trial. After some consideration we can discover no good reason why the defendant should not recover his costs, which, in accordance with a reputable precedent* we

April Sessions, 1847.

* Thomas v. White, 12th Massachusetts, 370.

DECREE ACCORDINGLY.

[APRIL SESSIONS 1847, NO. 13 COMMON LAW DOCKET.]

NONES VS. EDSALL, M. C.

[PRACTICE: PRIVILEGE OF CONGRESS.]

Attendance upon Congress, as a member of that body, does not confer such "privilege," as to entitle a party to have a postponement of his suit as *a matter of right;* though the court may grant a postponement under particular circumstances (—and did grant it in this case,—) in its discretion, and upon terms. The dictum in Geyer's Lessee v. Irwin, 4th Dallas, 107, is not law.

This case being set down for trial at the present term of this court, the counsel of the defendant moved for a *continuance*, claiming it *as matter of right*, and assigning for cause—what was admitted to be the fact—that the defendant *is a member of Congress*,

April Sessions, 1848.

Statement.

April Sessions, 1848.

and at this time in attendance upon Congress at Washington City. It appeared also that the defendant was sick at Washington, and had been unable to subpœna his witnesses or prepare his cause for trial.

In asking a continuance, the counsel of the defendant relied on a case in the Supreme Court of Pennsylvania, A. D. 1790,* where Mr. Lewis, producing an affidavit of a just defence, moved to set aside a judgment, which had been entered some time before, in a case on the trial list, against a member of the General Assembly of the State; assigning as ground, principally, that the defendant was a member of that body attending his publick duty at Philadelphia at the time when the judgment was entered. The counsel of the party, it appeared, however, had been present, and without claiming privilege had confessed judgment rather than go to trial without proofs; and it was on that account that the court refused to open the judgment. The omission to claim privilege at the proper time, says the court "amounts to a waver, by which the party is forever concluded." But no doubt was entertained by the court, if the privilege had been claimed at the proper time—when the case was called—that the cause should have been continued. "A member of the General Assembly," says the court, "is undoubtedly privileged from arrest, summons, citation or other civil process during his attendance on the publick business confided to him. *And we think that upon principle, his suits cannot be forced to a trial and decision while the session of the legislature continues.*"

* Geyer's Lessee v. Irwin, 4th Dallas, 107.

APRIL SESSIONS, 1848.

THE COURT'S OPINION.

GRIER, J. We cannot allow you to continue this case as a matter of right, on your claim of privilege. The opinion expressed by the Supreme Court of Pennsylvania in the case cited, has been considered rather as a dictum than a decision; and we do not think it founded on correct principle, or supported by precedent. Members of Congress are privileged from arrest both on judicial and mesne process, and from the service of a summons or other civil process while in attendance on their publick duties. Indeed, it was at one time doubted whether this privilege from arrest extended to judicial or final process.* But though that is now conceded, because an arrest would interfere with his publick duties, yet none of the reasons on which this privilege is allowed, can extend it to the right to continue a cause pending in court. We cannot allow it *propter dignitatem*, alone, unless as a matter of comity, which would require the consent of the opposite party. Assuming the fiction of law to be a practical truth, that a member of Congress cannot absent himself from his duties unless to the detriment of the publick, yet it does not necessarily follow, that if this trial proceed the defendant need be compelled to neglect his publick duties. In contemplation of law he is already in court by his counsel; and his personal attendance is not required at the trial either in theory or in practice. We all know that causes are tried in this and every other civil court, almost daily without the presence of the parties. Any other person may be employed to subpœna witnesses, and if the attorney be properly instructed in his case, the presence of his client on the trial is of little importance. Hence, it is well settled that the sickness of a party is, of

*Starrett's Case, 1st Dallas, 356.

April Sessions, 1847.

The Court's Opinion.

itself, no sufficient reason for postponing the trial of a cause. If a physical inability to attend court, be not a sufficient reason for postponing a cause, it is not easy to perceive why a factitious or fictitious inability should be vested with any higher privilege.

We are not willing, therefore, to concede to the defendant a continuance of this case, when claimed as a matter of privilege and right; but we are disposed to grant it, in the exercise of our discretion, and for the reasons urged, on condition of payment of the costs of the term.

CONTINUANCE GRANTED.

[AT TRENTON.]

WILTON VS. THE RAIL ROADS.

[EVIDENCE UNDER PATENT ACT: PRACTICE.]

The 15th section of the act of Congress of July 4, 1836, commonly called the Patent Act, does not require notice of the names and places of residence of the witnesses, by whom it is intended to prove a prior knowledge and use of the thing patented.

Oct. Sessions, 1847.

Statement.

In this suit, which was one for an infringement of a patent right, the defendants pleaded the general issue; and relying in their defence upon a previous use and knowledge of the thing patented, gave notice to the plaintiffs under the act of Congress,* that

* Of July 4th, 1836, § 15: 5th Statutes at Large, 123, that the defendant shall be permitted to plead the general issue, and to give any special matter in evidence of which notice in writing may have been given thirty days before the trial, tending to prove that the thing patented had been in publick use, &c.

they would offer proof upon the trial, that it had been publickly used at certain places which they named, and that a prior knowledge of it was possessed by certain persons whom, together with their places of residence, they also named: But the notice did *not* specify the names nor residences of *the witnesses by whom* it was intended to prove what was thus notified. Oct. Sessions, 1847.

The act of Congress* which allows this defence and notice says: "Whenever the defendant relies in his defence on the fact of a previous invention, knowledge or use of the thing patented, he shall state in his notice of special matter *the names and places of residence of those whom he intends to prove to have possessed a prior knowledge of the thing, and where the same had been used.*" * July 4th 1836, § 15. Statement.

Mr. Mallery now calling upon a witness to prove where and by whom the thing had been used, Mr. Hazlehurst objected to the testimony, because the name and residence of the *witness* had not been given. He cited Greenleaf on Evidence,† where it is said "the facility with which this defence" (of prior use,) "may be made, affords a strong temptation to the crime of subornation of perjury; to prevent which the defendant is required to state, in his notice, the names and residence of the witnesses by whom the alleged previous invention is to be proved." He cited also *The Philadelphia and Trenton Rail Road* v. *Stimpson*,‡ in the Supreme Court of the United States. The court below had rejected the testimony of one White, for want, says the Reporter, "of the notice *required by the act of Congress,* Against the evidence, Oct. 21st. †Vol. 2, § 501. ‡14 Peters, 448, 459.

Oct. Sessions, 1847.

of the use of the machine *at Mauch Chunk, at which place* it was said his testimony would shew it had been used." This report, Mr. Hazlehurst thought, did not shew precisely what notice was or was not given, but Judge Story in giving the opinion of the court clearly did. "There is no proof on the record," says that Judge, "that notice had been given *according to the requirements of the statute*, that *White was to be a witness*," &c. "Unless *such* notice was given, it is plain that the examination could not rightfully be had." What notice does the court here mean, as being within "the requirements of the statute?" Clearly "that *White* was to be a witness." Dr. Greenleaf, without quoting this case, yet seems to have the same notion of the requirements of the act. Indeed, if a witness *knows*, i. e. legally knows, of another man's discovery, he himself knows of the discovery, and the notice ought to be given.

In favour of the evidence. Oct 21st.

Mr. MEREDITH contra: There has been a misconception of the act by Judge Story and by Dr. Greenleaf who follows him. The case cited,* shews that the ground of the rejection of White's testimony, was because notice was not given of a use of the machine at *Mauch Chunk*. White was, himself, the person who had used it there, and his *name* ought to have been given, not as witness, but as that of a person who "possessed a prior knowledge of the thing." The point adjudged was as to the "*place*." The language of the court or rather the Judge who delivers the opinion of the court, is loose, and goes for what it is worth.

* The Phila. & Tren. Rail Road v. Stimpson, 14th Peters, 448, 459.

Oct. Sessions, 1847.

The Court's Opinion, Oct. 21st.

GRIER, J. The language of the act, I think, requires nothing more than the names and residences of the persons who possessed the prior knowledge of the thing patented, and the name of the place at which it had been used. It would be unreasonable to extend it, unless it clearly required us to do so, to the *names and residences of all the witnesses* whom the defendant meant to summon. The other requisition is reasonable enough, and was intended to guard against surprise from such evidence as was given in Whitney's case.* Though Mr. Whitney's cotton gin was an invention of perfect originality, two persons were yet brought forward, one of whom testified that he had seen a similar machine in England seventeen years before, and the other that he had seen one in Ireland.

*Whitney v. Fort, A. D. 1807, Fessenden on Patents, ed. 1822, p. 134.

It would have been quite enough in order to disprove it, that the other side had had notice of the place at which, and name of the party by whom, the alleged prior machine was used.

[APRIL SESSIONS, 1845, NO. 2, COMMON LAW DOCKET.]

LOMBARD VS. BAYARD.

(LIEN OF JUDGMENT IN CIRCUIT COURTS,)

(DUTIES AND COMPENSATION OF AUDITORS; RATES OF PROFESSIONAL CHARGES.)

The lien of a judgment in this court is co-extensive with the district, and is not confined to the County of Philadelphia merely.

The compensation of auditors is regulated not only by the labour which they have, but also by the amount of money to be distributed.

APRIL SESSIONS, 1848.

In this case the court speaks of the considerations which may properly influence professional charges.

STATEMENT.

The defendant's real estate, situate in Lancaster County, Pennsylvania, having been sold on an execution from this court in favour of Lombard, the plaintiff; a question arose between him and some other parties, junior incumbrancers in the County Court of Lancaster where the lands are situate, as to who was entitled to take the money. Lombard contended that the judgment of this court was co-extensive, as an incumbrance, with the Eastern District of Pennsylvania; a position which, if true, would give the money to him; Lancaster County being within the district, and he the oldest incumbrancer. The Lancaster County creditors, on the other hand, contended that a judgment in this court was similar in its effects with a judgment in any of the State courts, and that it bound no lands out of the *county* where it was entered. The matter being referred, according to the Pennsylvania practice, to an auditor to report upon, that gentleman decided that the lien of this court's judgment was co-exten-

sive with the district, though this embraces several counties besides that of Philadelphia, where the court sits. One exception, the first, was to his decision on this matter. APRIL SESSIONS, 1848. STATEMENT.

In the argument upon it, which was conducted by Mr. PENROSE, Mr. HARRIS and Mr. B. H. BREWSTER in favour of the exception, and by Mr. RAWLE and Mr. J. M. READ in favour of the report, a good deal of speculation was had about the origin of liens from judgments. It was admitted, however, that whencesoever the effect came, judgments had been liens in Pennsylvania ever since 1700,* in which year, an act of the State legislature made lands liable to sale on execution. It was admitted also that by the law of the State in 1789, when this court was constituted, a judgment in the Supreme Court of the State was a lien co-extensive with the State itself.† It was also admitted that an act of the State legislature‡ limiting the lien of judgments to five years, had been considered as applicable to judgments in this court, though the act was passed many years after this court was organized.

* 1 Smith's Laws, 7 & notes.

† Ralston v. Bell, 2 Dallas, 158; S C. White v. Hamilton, 1 Yeates, 183.

‡ April 4th 1798.

Upon this last admission, the counsel for the exceptant grounded the strong point of their argument. The State in the year following that when the last mentioned act was passed, enacted§ that "no judgment rendered in the Supreme Court or in the Circuit Courts [of the State,] shall be a lien on real estate, *excepting in the county in which such judgment shall*

§Act of March 20th, 1799, "to enable the Justices of the Supreme Court to hold Circuit Courts within this Commonwealth." It established a Circuit Court in each county of the State except Philadelphia. Each county to have a clerk, &c: gives an appeal from each circuit to the Supreme Court in Banc, and after the decision there, requires the record to be returned below. See p. post. 201.

April Sessions, 1848.

be rendered:" And the counsel for the exceptant contended, that as this court had conformed to the State law concerning the *duration* of judgments, it was equally bound to conform to it when settling their *extent:* a position which it was supposed derived force from the testimony of Mr. Francis Hopkinson, lately the clerk of the court, who stated that from 1831 to 1846, during which term he had held office, it had never been customary to send for searches here when the land to be sold did not lie in Philadelphia County.

The counsel on the other side contended, that the act was merely intended to prevent the evils which might arise from applying the established law about the lien of judgments to the system of State *Circuit* Courts, which that act established.

The Court's Opinion As to the extent of the lien.

GRIER, J. In the conclusion to which the court comes as to the extent of the lien, we assume the following points, without attempting to fortify them by arguments or authorities:

1st. That the lien of judgments in the courts of the United States, does not result from any direct legislation of Congress on that subject.

2d. That under the Judiciary act of 1789, which ordains,* "that the laws of the several States shall be regarded as rules of decision at common law in courts of the United States;" these courts have uniformly adopted the principles of State policy and jurisprudence, on the subject of the lien of judgments so far as the same were applicable, treating them as rules affecting real property and its transmission, whether by descent or purchase. This

* § 34.

doctrine is fully recognised by implication in several acts of Congress touching this subject.* APRIL SESSIONS, 1848.

3d. That from the earliest history of Pennsylvania to the present time, judgments have been considered as liens upon land; and this not by adoption of the statute 13th Ed. I. chap. 18, commonly called the statute of Westminster 2, or statute of elegit,† nor by virtue of the statute 2d Geo. II. but because from the first settlement of the colony, or at least since the year 1700, "all lands and houses whatsoever," ... were "liable to sale upon judgment and execution obtained against the defendant, the owner, his heirs, executors," &c.‡ THE COURT'S OPINION As to the extent of the lien.

*Acts of 19th May 1828, § 2, & 4th July 1840, § 4.

†Allen v. Resor, 16 Sergeant & Rawle, 11.

‡Act of 1700.

4th. That in 1789, when the Circuit Courts of the United States were established, the law of Pennsylvania was settled both by judicial decision and act of Assembly, recognizing the doctrine§ that a judgment of a court of record bound the lands of the debtor, situated within the territorial jurisdiction of the court, for an indefinite period of time. Thus a judgment in the Court of Common Pleas, whose jurisdiction by mesne process extended over a single county, was a lien on all the lands within that county only, and not over the State, although testatum executions might issue to any county. But judgments in the Supreme Court bound lands over the whole State.‖

§Act of 21st March 1772, 1 Smith, 389.

‖Ralston v. Bell, 2 Dallas, 158; S. C. White v. Hamilton, 1 Yeates, 183.

5th. That the act of Assembly¶ limiting the lien of judgment to five years unless revived by *scire facias,* has been considered as a rule of property binding on this court, and therefore adopted by it, although passed subsequent to 1789.** It results as

¶April 4th, 1798, § ii.

**Thompson v. Phillips, 1 Baldwin, 259.

April Sessions, 1848.

a necessary conclusion from these admitted principles, that the lien of a judgment in this court in 1789, was co-extensive with the State, which was then the boundary of its jurisdiction by mesne process. But while this position is conceded, it is contended also that this court is bound to conform to the legislation of Pennsylvania since 1789, limiting the extent of the lien of a judgment in the same manner as we have already adopted it with regard to limitation of time: and the act of Assembly* limiting the lien of judgments in the Circuit and Supreme Courts of Pennsylvania, to the county where they were rendered, is relied on as exhibiting the policy of the State on this subject, and constituting a rule which this court is bound to adopt. It is not necessary to decide, nor are we willing to concede, that if the Legislature had enacted in direct terms that the lien of judgments in this court should be limited to the County of Philadelphia, we would have felt bound to conform to the enactment. But admitting this point for argument's sake, we cannot see that the act of Assembly relied on, has any, or was intended to have any application to this court. It is not the enactment of a general principle or doctrine affecting real estate or liens in general, or establishing the incidents and effect of all judgments in all courts. But this section was introduced to guard against a great inconvenience which might arise, by the application of the well known doctrines of the law, in relation to the lien of judgments to the new system of Circuit Courts established by that act. It is entitled, "an act to enable the Justices of the Supreme Court to hold Circuit Courts within this

The Court's Opinion
As to the extent of the lien.

* March 28, 1799, § 14.

Commonwealth." It establishes a Circuit Court to be held in each county of the State except Philadelphia. Each county to have a clerk, seal, &c. Gives an appeal to the Supreme Court in banc, and after the decision, requires the record to be returned to the Circuit Court of the county and execution to issue therefrom. Now unless the act restrained the extent of the lien of a judgment in each of these forty county circuits, to the limits of its territory, it was most probable that in consonance with the previous decisions of the Supreme Court touching the subject, the lien of a judgment in any one of these numerous courts would have been construed to affect lands over the *whole State*. This would have been not only a great inconvenience but an intolerable evil, as purchasers would have been compelled to search for liens, not merely in the Court of Common Pleas of the county where the land lay, and the Supreme Court, but in some forty or fifty others. To remedy this evil, the section of that act was introduced which is now under consideration. It enacts, that "from and after the last day of December term next, no judgment rendered either in the Supreme Court or any of the other said Circuit Courts, shall be a lien on real estates excepting in the county in which such judgments shall be rendered; and that every testatum execution shall be a lien upon lands and tenements only from the time of the delivery thereof to the sheriff, who is directed to endorse the precise time of receiving the same, and shall certify forthwith a transcript thereof, together with the day and time of such testatum execution coming to his hands, in and to the office

April Sessions, 1848.

The Court's Opinion as to the extent of the lien.

APRIL SESSIONS, 1848.

of the clerk of the Circuit Court of the county in which such lands or tenements shall be, &c. &c."

THE COURT'S OPINION As to the extent of the lien.

It needs no argument to show, that this act annuls no established doctrine or principle, and sets up no new one which must bind all courts as a rule of property, and that it applies only to a peculiar system of courts then first established. It could not be intended to affect the lien of judgments in this court, nor can we adopt it according to its letter if we would. The evil guarded against is not incident to this court: our jurisdiction is not bounded by the limits of a county, nor have we this multitude of places of holding our courts and keeping our records. We issue no testatum executions within this State. Counties, says Lord Coke, are parts of the kingdom into which the whole realm is divided for the better government thereof. Every of them is governed by a yearly officer called a sheriff. The county is hence called his bailiwick. It is called comitatus *a comitando;* for as much as men of one county do not accompany together with men of another county at county courts, towns, leets and other courts, &c. As divisions of territory and jurisdiction for facility of the administration of justice by the tribunals of each State, they are wholly unknown to the Circuit Courts of the United States, whose county is the State or district subject to their respective jurisdictions. The county or bailiwick of the marshal is the district. This court is not the Circuit Court of Philadelphia County, but of the Eastern District of Pennsylvania. The enumeration of counties in the act of Congress constituting it, is but for facility of designating its boundary.

So far as any general principle can be elicited from this act of Assembly, affecting the doctrine of the lien of judgments which this court can apply. It is no more than this: That the lien of judgments shall be co-extensive with the original jurisdiction of the court in which they are entered, that is the territory within which their mesne process runs, as distinguished from writs of execution. The adoption of this principle would limit the lien of our judgments to the Eastern District of Pennsylvania.

But on this subject we are not without precedents establishing the position we have taken. The case of *Dere* v. *Jones** is in point. An act of the Legislature of Indiana, passed in 1824, limits the lien of judgments in the Circuit Court of that State, to the counties in which the judgments were entered. And it was contended in that case as in this, that judgments in the Circuit Court of the United States should be subject to the same rule. But it was decided by Mr. Justice M'Lean, that this act could not apply in the manner contended for to judgments rendered in that court. "Effect," says he, "must be given to the provisions of this law, so far at least as they are adapted to the organization of this court. If the rules of the proceeding by the Circuit Courts of the State be followed by this court, effect is given to them without reference to the limited jurisdiction of these courts. *The limits of the State in the exercise of the jurisdiction of this court, is as the limits of the county to the local courts.* The principles of the State law are adopted, but the instruments which give effect to these principles are necessarily different, and they are made to operate throughout

* 2 M'Lean, 78.

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a more extended jurisdiction. In *Sellers* v. *Coven*,* the Supreme Court of Ohio decide that the lien of a judgment in the Circuit Court of the United States for Ohio, was co-extensive with the territorial jurisdiction. The case of *Konig* v. *Bayard*,† in the Circuit Court of the United States in the Southern District of New York, and the case of *Manhattan Bank* v. *Everton*,‡ are to the same effect.

* 5th Ohio, 400.

† 2 Paine, MS.

‡ 6th Paige, 466.

EXCEPTION OVERRULED.

This point being disposed of, a second exception was to the sum charged by the auditor for his services in the matter. Upon this part of the case, it appeared that the parties had met informally three or four times before the auditor to agree upon and settle the exact state of some undisputed facts; but that no argument was had upon the point of law involved in the question of the lien: one of the counsel telling the auditor that he did not want any thing but a *pro formâ* report, so as to take the point of law before the court in the shape of an exception to the report, where it might be fully argued and settled.*

2d Exception. Auditor's charge.

* For the information of gentlemen not acquainted with the practice in Pennsylvania, it may be well to state, that a portion of the duty of "auditors" usually is to make publick advertisement, in two newspapers, of the fact of their appointments, and of the time and place of meeting; describing the property sold, and calling upon all persons interested in the proceeds of it to attend before them. They also usually procure from the different offices certificates of all incumbrances on the property, and after making their report, send notices to the various parties or their counsel who have appeared before them, informing such persons that the report has been made, is ready to be seen, and requiring them if any exception is wished to be made, to except thereto within a certain time and in a certain way. The auditor collects and preserves the various evidences of this discharge of his duty: and for advertisements and searches, sometimes pays money from his own pocket in advance.

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The auditor made a report of eighteen foolscap pages, in which he examined numerous authorities and stated his reasons for the conclusion to which he arrived; a conclusion which as we have already seen was confirmed by this court. He was a gentleman who had practised with credit for several years at the country bar, and had recently established himself in this city, and his opinion, so far as the reporter could judge of it, was a very respectable production, in which the authorities were collected with a good deal of diligence. The fund in court was $60,333 $\frac{80}{100}$, and the auditor's charge, deducting his expenses, was about $225. The defendant had already paid $1202 in costs, including a sum of $303 $\frac{16}{100}$ to the clerk for mere per centage.

Against the auditor's charge.

Mr. Penrose, in behalf of the exception to the auditor's charge, contended that the charge was extravagant. The auditor was requested to confine himself to a *pro formâ* decree merely. Counsel undoubtedly have a right to ask for such a decree; nor will the court impose upon suitors the expense of having cases decided by any tribunal but those regularly constituted courts of the country, which all are taxed to support, and by whose judgments all are willing to be bound. In the present case the defendant, having discharged *legal* costs amounting to more than $1000, is compelled to pay $225 more—for what? an opinion of a private individual, of no authority nor value whatsoever to him or to any body. It is of no value to the court, who are bound to sit here and have sat here to listen to the argument of counsel on the point passed upon by the auditor, and to decide it exactly as if no report had ever been made. The auditor,

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finding that the sum was large, has gone into a voluminous disquisition for no object, it would seem, but to give himself an apparent right to a large compensation: He was requested to state the facts of the case and to give a formal decree only. Now the magnitude of the sum in court is not a proper element for consideration in settling the auditor's recompense. His judgment is not made either more or less correct by that fact. But at any rate the sum was extravagant. It is well known that the most eminent members of this bar—among whom the auditor is not asserted to be—constantly give opinions on the most important points, for sums varying from $10 to $50. In *Fitzsimmons' Appeal*,* the charge of the auditor,—which was objected to by counsel,—was but $10. It is hoped, in short, that the court will lay its hand upon an abuse, which has been a grievous one in the inferiour courts of Philadelphia, and which, unless speedily arrested, will justify all the feeling which it has provoked. It has there already come to the condition which made Lord Eldon say of the English bankruptcy system in 1801,† that there "is *no mercy to the estate*;" that "nothing is less thought of than the *object* of the commission," and to speak of it as "little more than *a stock in trade* for the commissioner, the assignees and the solicitor."

Against the auditor's charge.

* 4th Penn. State Rep. 249.

† 6 Vesey, Jr. 1.

Mr. J. M. Read, for the auditor, stated that this gentleman desired to refer himself entirely to the judgment of the court in the matter, and had nothing to reply to what had been said.

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GRIER, J. That the auditor is entitled to a reasonable compensation for his services cannot be denied: the objection here is to the amount. On this subject generally, the Supreme Court of Pennsylvania remarks,* very properly we think, that "the duties of an auditor are a necessary and often a very important part of the administration of justice. In the Orphan's Court the duties are in many respects similar to those of a master in chancery, and in the Common Pleas they are required to perform onerous and responsible services. Diligence, intelligence and discretion are required; and unless these essential qualities are present the actual labour expended will often be useless. .... Unless suitable compensation is given, this useful function of the law cannot be fulfilled: for men of capacity and usefulness will not be found willing to expend their time for the benefit of others without some reward. Every where in the Commonwealth, courts have authorized and sanctioned a reasonable allowance; and unless that practice is continued, the interest of creditors, of widows and orphans, of executors and administrators, and indeed the entire publick, which is always concerned in the intelligent administration of the laws, will suffer detriment."

THE COURT'S OPINION, As to the Auditor's charge.

* Fitzsimmons' Appeal, 4th Penn. State Rep. 248-9-50.

The law has established no rate of fees to be allowed as compensation to auditors, masters in chancery, &c. Hence the court has no rule by which to measure the charge. The law could not well fix a standard that would be just in all cases; nor can the court. The services of men of learning, skill and experience in their professions, are not to be rated like those of day labourers. It is a question of great

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The Court's Opinion, As to the auditor's charge.

delicacy for the court to be called on to judge of what is a proper compensation for them. The facts of the case, from their character, cannot be sufficiently brought, or very decently discussed before the court, nor the compensation tested by any certain rule: and this last point must generally be submitted to the candour and judgment of the members of a profession eminent, among all others, for honour and integrity.

It is said that gentlemen of the Philadelphia bar usually charge from $10 to $50 for an advice or opinion. This may be true in small matters of daily occurrence. But I think that few gentlemen of the bar in this city would prepare notices, see them correctly printed and duly published, would afterwards attend four days to meet the parties and their counsel, and then spend at least as many more in writing out a long, learned and elaborate opinion, in a case where *many thousands of dollars were in contest*, for any such compensation. Every gentleman of the bar well knows that there cannot be any one rule of charges in the nature of a horizontal tariff for all cases. Often, where the parties are poor and the matter in contest is small, counsel receive but very inadequate compensation for their exertion of body and mind: and for myself I know that for some of the most severe labour of my professional life, I have been the least well paid. In other cases where the parties are wealthy, and the sum in controversy large, they will receive a tenfold greater compensation for perhaps a tithe of the same labour. In some cases the whole sum in dispute would be poor compensation. In others, five per cent. of it will be

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The Court's Opinion, As to the auditor's charge.

very liberal. Hence, in all cases, professional compensation is gauged not so much by the amount of the labour, as by the amount in controversy, the ability of the party, and the result of the effort. And this is perfectly just.

In the case before us, if the sum to be disposed of by the auditor had been $1000, one tenth of his present charge would be $2\frac{1}{4}$ per cent. of the fund, and yet it would have been a very inadequate compensation for several days of professional labour and investigation, to say nothing of the merely mechanical duties which all auditors have to perform alike, and which, though not requiring great ability, distract attention and employ time. In the present case the charge is considerably below the half of one per cent. upon the fund to be distributed. The labour, learning and professional character, requisite to perform the duty committed to the auditor in this case, was tenfold of that required of the clerk for every service which he has rendered in the suit, and yet the law, by allowing him a *per centage* of a half of one per cent. on the money in court, has given him a sum nearly a third larger than that charged by the auditor: And he has had besides a fee for each particular service.

Seeing therefore that the fees and emoluments allowed by law to its officers, are estimated by a compound ratio one of whose multiples is the sum in controversy, as well as the actual labour bestowed, we cannot say that the charge of the auditor is so extravagant as to call for interference from the court.

The allegation that the case was not argued by

April Sessions, 1848.

counsel before the auditor, is no ground for lessening his compensation, since its only effect was to impose upon *him* the necessity of investigations which would otherwise have been made by the counsel. And the case is not altered by the assertion that he might have made a *pro formâ* decree; since the nature of the reference and the order of the court imposed upon him the duty of *examining* the subject and reporting the result of his investigations to the court for its relief; a task which he has performed with learning and good judgment.

EXCEPTION OVERRULED.

[APRIL SESSIONS, 1845, NO. 28, COMMON LAW DOCKET.]

MILLER VS. LERCH.

[CORPORATION'S CAPACITY TO HOLD IN TRUST.]

A religious corporation, created under the act of April 6th, 1781, of the Pennsylvania Legislature, can be a trustee for the heir at law of the testator, who devised certain lands to it in trust for uses that were void. The statute of mortmain, 9 Geo. II. chap. 39, has never been in force in Pennsylvania.

Oct. Sessions, 1848.

Statement.

Peter Miller of Easton, devised an estate of about $300,000 to two church corporations of that town, upon certain trusts which his heir at law, the present plaintiff, contended were void, but which the corporations asserted were charitable uses, and as

Oct. Sessions, 1818.

such entitled to the protection given to that class of gifts. A large part of the devise was real estate, which the present action—*one of ejectment*—was brought to recover. The question was, whether admitting the trusts to be void, the plaintiff had such a *legal title* as would enable him to recover here *in ejectment*. In other words, whether the legal title was not in the *corporations*, and whether the remedy of the heir was not by bill in equity on the other side of this court. Both corporations were created under an act of Legislature,* which, with a supplement, empowered them to "take, receive and hold all and all manner of land, &c. to be employed and disposed of according to the objects, articles, and conditions" of their charters, "provided that the clear yearly value or *income* of the messuages, &c." did not exceed $2000. The charters gave no express power to hold lands in trust for purposes not within the scope of their objects.

* April 6th, 1791, 3d Smith & Reed, 20.

Argument for pltf. Oct. 25th & 26th.

Mr. J. M. PORTER and Mr. M. H. JONES in support of the action: If the legal title is out of the heir and in the corporations, it can be there for one of two purposes alone; that is to say, either for the use of the corporations themselves; or in trust for the heir at law.

Certainly the corporations do not hold for themselves. The statutes of mortmain apply to Pennsylvania corporations, whatever counsel† may have said *arguendo*. The Judges of the Supreme Court of this State, in their report upon the English statutes in force here,‡ say that these acts "are so far in force, that all conveyances either by deed or

† Vidal v. Girard, 1 Howard's S. C. Rep.

‡ 3d Binney, 626, Dec. 14th, 1808.

Oct. Sessions, 1848.

will, of lands, tenements or hereditaments, made to a body corporate, or for the use of a body corporate *are void*, unless sanctioned by charter or act of Assembly." And the Legislature of the State declared the law to be the same way, twenty-five years afterwards in the preamble to one of its statutes.* The enacting part of the statute, it is true, had reference to a particular matter, but the general and then existing law of the Commonwealth is explicitly and intelligently declared in this preamble;—a preamble that would operate not only as a declaration of the then existing law, but if necessary as an *adoption* of the statutes of mortmain, so far as any thing but enactment can adopt them. "Whereas it is contrary," says this act, "to the laws and policy of the State, for any corporation to prevent or impede the circulation of landed property from man to man, without a license from the Commonwealth, and *no corporation*, either of this State or of any other State, though lawfully incorporated or constituted, *can in any case, purchase lands within this State, either in its corporate name, or names of any person or persons whomsoever for its use*, directly or indirectly, without incurring the forfeiture of said lands to this Commonwealth, *unless said purchase be sanctioned and authorized by an act of the Legislature thereof;* but every such corporation, its feoffee or feoffees, hold and retain the same, subject to be divested or dispossessed at any time by the Commonwealth according to due course of law," &c. Indeed the act "enabling religious societies of Protestants within this Province to purchase lands,"† was necessary to counteract the operations of these

*Act of April 6th, 1833.

†Act of February 6th, 1730-31, 1st Smith, 192.

statutes. But that act never went further than to enable those societies to take scites for churches, houses of religious worship, schools, alms-houses, and for burying grounds. And though the act under which these corporations are created, allows them to hold lands to a larger extent, yet it does not enable them to take such a vast estate as is here devised; the yearly value of which is far above $2,000. Oct. Sessions, 1848.

Neither can the corporations be trustees for the *heir*. Indeed, as is well known, it was formerly doubted whether a corporation could be a trustee for any purpose; whether it could be seized to any use and convey by bargain and sale; and though the modern doctrine is, that a corporation may be a trustee for some purposes, that is to say, for purposes *within its scope*, it has never been held that a corporation can be seized of a bare legal estate to hold in trust for a purpose no way connected within its scope,—which is foreign from its purpose—and which arises only in consequence of the uses being void for which the property was conveyed. The uses are void: The devise is void; and the heir takes directly. He has, we think, the legal title and, of course, can maintain ejectment. Argument for plff. Oct. 25th & 26th.

Mr. Sergeant and Mr. Bayard on the other side were relieved by the court, after merely stating their points.

Grier, J. In England, under the statute of 9 Geo. II. chap. 36,* when lands are devised to a The Court's Opinion, November 8th.

* This statute enacts, § 1, that no manors, lands, &c., nor money, &c., shall be given, &c. to charitable uses, unless by deed indented and executed before two witnesses, 12 months before the death of the donor, executed with certain formalities, and by § 3, that gifts, &c. "made *in any other manner or form* . . . . shall be absolutely, and to all intents and purposes, *null and void*."

Oct. Sessions, 1848.

The Court's Opinion November 8th.

charity, the trust not only is itself void, but it vitiates the devise of the legal estate on which it was engrafted. And therefore in such cases the heir may recover *at law*, except where there are other trusts not charitable, which, of course, would entitle the trustees to retain the estate, and oblige the heir to prosecute his claim in equity.* But this statute, which is usually, though rather inaccurately, called "The statute of Mortmain," was never adopted in Pennsylvania, nor is there to be found any similar provision in her own legislation. It is, however, by virtue of this statute alone, and not by any principle of the common law or provision of earlier statutes, that *courts of law* in England treat the devise or gift as void, and permit the heir to recover in them.†

*Jarman on Wills, 200.

†Doe v. Wright, 2d Barnewall & Alderson, 710.

I am aware that the Judges of the Supreme Court of Pennsylvania, in their Report upon the English statutes in force in Pennsylvania, make the following remarks: "There are several statutes called statutes of mortmain, one of which (the statute de Religiosis) was passed in the 7th year of Edward I, statute the 2d: another in the 13th year of Edward I, chap. 32, another in the 15th year of Richard II, chap. 5, and another in the 23d year of Henry VIII, chap, 10. These statutes are, in part, inapplicable to this country, and, in part, applicable and in force. They are so far in force that all conveyances either by deed or will, of lands, tenements or hereditaments made to a body corporate or for the use of a body corporate, are void, unless sanctioned by charter or act of assembly. So also are all such conveyances void made either to an individual or to any number of persons associated but not incorporated,

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if the said conveyances are for uses or purposes of a *superstitious* nature, and not calculated to promote objects of charity or utility."*

The Court's Opinion, November 8th.

* 3d Binney, 626.

How far this report may be entitled to consideration as a judicial authority, it is not necessary for me to consider; for the assertion that deeds and wills of land made to a body corporate are void, has long been admitted to be a mistake. Indeed, I fully concur with those who refuse to admit that any of the English statutes of mortmain have, or *ever had*, any operation in Pennsylvania. They were mere statutes of policy, in contravention of the common law, and were passed to prevent the king and mesne lords from being deprived of their feudal and seignoral rights accruing by prerogative and tenure. Some of them were aimed avowedly at the Roman Catholick religion. Our tenures of land subject them to none of those feudal burthens from which they escaped by alienation to a corporation, and which, for this reason, were called alienations in mortmain, or dead hand. Lands held by corporations may, in general, be aliened and taxed as lands held by natural persons are: and the state loses none of her prerogatives over them, except the possible chance of an escheat or collateral inheritance tax. They are, therefore, not properly in mortmain as regards the prerogative of the state as superior lord. And how can the term "superstitious" be predicated of any religion in this state? whose constitution acknowledges no church as orthodox, and holds all sects and all religions entitled not merely to toleration, but to equal protection?

But it is not necessary for the Court here to affirm

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or to deny any speculative doctrine on this subject. It has been examined with great learning and ability by my predecessor, the late Hon. Henry Baldwin, in his opinion in *Magill* vs. *Brown*, (the case of Sarah Zane's will) decided in 1833, and more recently by Horace Binney, Esquire, in his argument at Washington, in *Vidal vs. The City of Philadelphia;* both printed in pamphlet form. To those documents I would refer the persons who take an interest in the inquiry.

The Court's Opinion November 8th.

It is enough for the purposes of the present case that these statutes would not make *void* a conveyance in mortmain, but only expose the land to forfeiture by the entry of the Commonwealth. It is therefore a doctrine well settled in Pennsylvania, that a corporation has a right to purchase, hold and convey lands in this state without a license, until some act is done by the government, according to its own laws, to vest the estate in itself. The fact, therefore, that the license contained in the acts of incorporation limits the income of these corporations to $2000, cannot affect the present question, as it does not *avoid* the devise in consequence of its being beyond the limits of the license. The *legal estate* passes by the gift or devise to the corporation, and is defeasible by the Commonweath alone.*

*Leasure v. Hillegas, 7 Sergeant v. Rawle, 313: Runnion v. Costar, 14th Peters 122.

The remedy therefore of the plaintiff should be by bill in Equity, and not by Ejectment. If, on the hearing of the case in Equity, the Court should be of opinion that the trusts limited on this devise are such as a chancellor would not execute, it will treat the devisees as trustees for the heirs at law or

November 8th. Judgment for Defendant.

next of kin, and decree a conveyance of the legal estate to them. Oct. Sessions, 1848.

JUDGMENT ACCORDINGLY.

[APRIL SESSIONS, 1848, NO. 3, COMMON LAW DOCKET.]

WHITE VS. BROWN

[DOMICIL.]

Domicil of origin is not lost, for purposes of succession, by very long residence abroad, and *mere doubt*, even very strong doubt of a *real* intention to return.

The doctrine strongly applied by the verdict of a jury in the case here reported.

STATEMENT. October 2—16.

This was a feigned issue directed by the court to settle the domicil, at different times, of Mathias Aspden, an eccentrick, hypochondriack and solitary bachelor, who, born in Philadelphia prior to the American Revolution, died in the city of London, in 1824, leaving a will, executed in Philadelphia in 1791, by which he gave to his "heir at law," a personal estate which, at the time of this issue, amounted to about half a million of dollars. Judge Baldwin sitting in equity in 1833, had inclined to the opinion that Mr. Aspden was domiciled in England: but the matter coming before this court again, it was thought better to direct an issue to be tried at law. The evidence was very voluminous. It consisted

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of a printed 8vo. volume of nearly one thousand pages small pica; principally composed of letters, memorials, "and accounts of himself," which last Mr. Aspden was in the habit of writing in great numbers. In the course of twenty years since the suit had been originally brought, they had been diligently gathered from every part of the world where this eccentrick gentleman, in the course of half a century, had ever been. Mr. Aspden's history, so far as it bears upon the question of domicil, was essentially as follows:

His father was a native of Lancashire, England, who came to this country in 1718, and established himself in the city of Philadelphia. He left eleven brothers and sisters behind him in Lancashire. He had one daughter before he came, who married here, and whose descendants were numerous. His first wife being dead, he married a widow woman in the state of New Jersey, who had already six children, the descendants of whom were all numerous. Mr. Aspden, the more immediate subject of this report, was the only issue of this second marriage, and was born in 1748, in Philadelphia, *in the then British province of North America.* In 1760, being about twelve years old, his father went to England for surgical advice, and took his son with him. While there they visited their friends in Lancashire, *and the boy was placed for some time at school.* How long they remained in England did not appear exactly, but in 1764 Mr. Aspden, the father, made his will at Philadelphia, appointing his son one of his executors, and died there the following year. By this event young Aspden succeeded to an estate

Born 1748.

Went to England first time, 1760: put to school there.

In 1762 is a housekeeper and house owner in Philadelphia.

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which, in the account of those days, was reckoned large; and in the same year we find him *established as a housekeeper in his paternal residence at Philadelphia.* In 1766 he went again to England, returned to Philadelphia after about a year's absence, and in 1768 or 1769 *established himself in trade,* with one of his half brothers, named James Hartley; a partnership which was attended with very profitable results to both gentlemen, and which *continued till the breaking out of the American Revolution,* in 1775–6. *His political principles,* in connexion with this event, were with the British cause. He is spoken of as having been "a friend to his king and country," and was also a constant commercial correspondent of tories. But he never took up arms against the colonies, and to protect himself from insult mustered with the "insurgents." One of his ships having been arrested in England,—under an order in council, and the English prohibitory act which forfeited all vessels found in American ports after a certain period, if owned in America,—he resolved in 1775 to go to England in one of his own vessels to recover it, but did not go. He sent over, however, all his vessels, and afterwards sold them in England. In March, 1776, being at this time engaged in business yielding him over £2000 sterling a year, he again resolved to sail for England, and having actually sold much of his real estate not immediately in the city, *and left a general power of attorney* to manage, dispose of and settle all his affairs;—having also made a draft of a will and also a will;—in all three papers describing himself as "of Philadelphia, Merchant"—and in the first as about to "*depart the province;*" in the second as

Went to England, 2d time, 1766, and returned.

In trade at Philadelphia till 1776.

Goes to England third time 1776, and remains 8 years and a half.

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Statement. October 2—16.

about "to depart to England;" and in the third as "intending to cross the seas *on a voyage* to Great Britain"—he went to New York to depart accordingly. He here obtained permission from the British governor to go in an English packet then there, on condition that all his letters and papers should be enclosed to the British Secretary of State, Lord George Germaine; a condition to which Aspden assented. Just as he was ready to sail, however, the governor annexed a further condition, st. an oath, that when he got to England, he would give information to the government there of any treasons, rebellions and conspiracies, which he knew of in America. A compliance with this requisition appears to have been repugnant to him; and after every effort to relieve himself from it had proved unavailing, he refused to accede to it, and returned to Philadelphia. Availing himself of a passage by another way, he left Philadelphia about the middle of September—*some days before Pennsylvania came into existence as a State, and before it was possible for him to owe to it as a State any allegiance*,*—and reached England, through Spain, in December, 1776. In regard to his intention of changing his domicil at this time, Bishop William White, who was connected by marriage with Mr. Aspden, testified as follows: "He was in the habit of familiar intercourse with my family a short time before he went away. I was in habits of free communication with him, and he with me. . . . . He never communicated to me *at that time*, any intention of changing his domicil, and I do not believe it was his intention to change his domicil *at that time*. On arriving in England, he proceeded to London, where, according

Respublica v. Chapman, 1 Dallas, 53.

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Statement. October 2—16.

to one of his "memoirs," written probably in 1785, he was almost immediately sent for by Lord Geo. Germaine, with whom he had a conversation of more than two hours, "in the course of which," he tells us that "he answered candidly and without reserve every question that was asked him, and *gave Lord George every information he knew of the state of things in America, as much as if he had been sworn to it a thousand times over.*" From this time till June, 1785—a term of eight and a half years—he remained in England, with the exception of an excursion of two months to the Continent. While there he received from his correspondents in England, their wishes that he may "*amuse* himself at Spa," "may amuse himself very well in Holland:" And on his return to England from Holland, their congratulations that he had received news of his friends in Philadelphia, where they hope that he "will be so happy as to meet them once again." On one occasion he speaks of himself "as an idle man until he could return to America:" on another, invests £4000 in British funds: on a third, expresses the pleasure it would give him to embrace his relatives in America, *but how to dispose of his property in England so as to admit of his return*, finds a matter of considerable difficulty: on a fourth, he describes himself "without an object," "awkward, as one may suppose, from the circumstances, and full as much so from *not knowing in what place to fix:*" on a fifth, will wait for peace, that he may *go back again and reside, if possible, in his old habitation:* on a sixth, he begs his correspondent to write fully on the subject of return; and adds that "the man-

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ner in which he has wasted the prime of his youth in England has been grievous, though not to be helped, as he was circumstanced: Therefore he does not reproach himself, nor does he expect, if he return to America, *that he can lead a very pleasant life.* "Comfort," he believes, "is not for him in his day."

But up to this date he appears to have been a man of unswerving unity of purpose, compared with himself in all after times. An event took place about this time which, by making it doubtful whether he could make more money by being an Englishman or an American, kept him prolonging and renewing one continuous chain of contradictions with himself and with everybody, which would almost lead us to conclude that the only object of his long life had been to make a "leading case" upon domicil, and to leave his vast estate dependant upon the shape of a puzzle that it should require a quarter of a century to arrange. In 1780 a proclamation was issued against him by the State of Pennsylvania, requiring him to appear by the first of April, 1781, to answer a charge of treason. He did not appear. The time was extended by the State for nine months further; the preamble of the act of extension reciting that it was represented that Mr. Aspden had been called to Europe about his own private affairs, had not received notice of the former act, and would certainly render himself up if indulged with further time. Not appearing at the end of the extension, he was soon after proclaimed a traitor, and all his real estate which he had not sold, confiscated. In consequence of this, he presented,

Proclaimed a traitor in 1781 by Pennsylvania.

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in 1783, a memorial under an act of Parliament to the British Government, claiming compensation as a *suffering loyalist.* In his petition he says of himself: "If he had not been attached to the British government and opposed to the revolution, it is not reasonable to suppose he would either have left America and all the nearest friends and connexions he had, at the early period he did, or, if this had been his determination, that he would have come to England, when there were other countries to which he might have gone, and been certain of meeting with a friendly disposition both on the part of the people and government, *particularly France,* where he could have placed any property he might have in Europe or might receive from America, to as much advantage and safety as in England." Speaking of his property he says, that "some was early invested in the funds, and some lay in private hands, at four and five per cent. but the whole became invested in the funds sometime before the peace, a period far from flattering, from a doubt in the minds of many, that a continuance of the war would give them an irrecoverable stroke, and which there is too much reason to suppose would have been the case had it not been for the success of Lord Rodney." But then tells us in reply to a question from the commissioners, *whether he intended to return to America, he said, "that he did once, to reside there if he could.* That England was a country where he had few friends or near relations, and to give them up as well as his native country was to make a great sacrifice." The commissioners allowed him nothing. He then came, July 1785, to Pennsylvania, with a

Returns to Philadelphia in July 1785.

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view of procuring from the government *here* a restitution of his property which had been confiscated.

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Originally an excessively timid man, his mind had by this time become morbid to a harmless insanity on the subject of his personal safety in America. Although he had every reasonable assurance that he was in no danger whatever, he was so concerned on that matter, that after a stay of but ten days in Philadelphia—consulting most of the time with lawyers about his safety—he went to New York, whence in twenty-three days from the time he had arrived, and without having done any thing at all on the subject about which he came, he set sail forthwith for England, where he soon after arrived. Writing of this journey, he says in one place, "I am just returned from my voyage, an undertaking I was *betrayed* into by the terms of the treaty:" and in another, "My friends in Philadelphia in their letters to me meant well; but did not enlarge so much as they ought to have done, which led me to consider myself as absolutely protected for a year by the treaty; and under this conviction, I thought it in some degree a duty incumbent on me to go to America, to *use my endeavours to get my property restored to me.* A few weeks before I sailed I wrote to the commissioners that I was going on this errand, and should take the earliest opportunity of letting them know the result, which I might have guessed and so been saved *this perilous and anxious jaunt; .... Most certainly I found no friends amongst any of them*, which could not but heighten the very uncomfortable life I had led in England for seven or eight years. And at last to find myself ensnared to death from being in the face

And stays 23 days in America.

Goes to England fourth time in August 1785, & remains there six years.

of a publick treaty, was giving the full completion to a man's sufferings. *How my lot may be cast now, I know not—or which way I shall turn myself; but happy should I be if I could form some little attachment and home, where I could be a useful member of the community*, and at the same time enjoy life with some little degree of satisfaction in the remnant I have left." In another letter of a near date, the same uncertainty appears. Speaking of his fortunate escape from the perils to which he had been exposed at Philadelphia, he says, "*Nevertheless I could not help at times casting my eyes back, and feel it a painful circumstance to be thus forced from my native country, friends of my early acquaintance, and a channel of business with which I was well acquainted, and which, if left at liberty to settle in the country, I would soon have got into again, and to as much advantage I believe as ever.* To return again, to this country, where I could not help telling the commissioners, in consequence of some questions they asked me, *I had few or no friends; a country where the remnant of property I have, will not go much more than half as far, as the same amount would in America;* and where *I know of no line of business in which I can engage, with either profit to myself or use to the community.* Does this accord with the words of the motto, "*Ubi panis, ibi patria?*"

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That he was not much more happy after arriving in England, than he was in leaving America, is apparent from a list of grievances which he records in the year 1785, that he had constantly suffered in the British isles. "My residence," he says, "since my first coming here, (a period of near nine years) except an

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excursion of six weeks I took one summer to Flanders and Holland, has been constantly in England; where I am sorry to say I have experienced, from first to last, treatment of the most pointed neglect and studied unkindness; and had I been capable of departing from my duty and joining in rebellion, the cause I have had has been great. Invitations have been given to an American lodging in the same house with me, to corporate dinners, and none to me; whom I believe they know to be a man of as fair prospects and as much credit in America as ever was in the city. In London, where I have principally lived—and the greater part regularly for five years at one house in Norfolk street—not a person of my mercantile acquaintance from the city—the only acquaintance I had, or as an American was able to get—ever called upon me to say, are you sick? Are you well? Are you in comfort or affliction? will you take a walk this morning in the park; or have you been to a play or any publick place? or will you go?" Not a single call in this way from any one, except from one who had reaped considerable profit by me, and a distressed loyalist, now and then for assistance, which was never denied. This situation, *joined to my views and prospects in life being cut up, and no likelihood, from the turns things have taken left of returning*, (which *was* my wish and intention) to any good purpose, is more than I can support." But then he finds it impossible to return, being tormented by the recollection that "in America they tell me there *is no such person as myself, but that I am dead in law to all intents and purposes.*" About the same time he writes again, "the inse-

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curity I found myself under in Pennsylvania, led me to make a very short stay there, and to take an opportunity of early returning again to this country, in which I have now been arrived about three weeks; and *where I think its probable I shall now remain, as my property in that country, it is likely will never be restored.* Immediately on his return to England, he presented another petition to the commissioners, but failed to get any thing, *because he had not sufficiently made out his loyalty.* Previously, in 1786, on the representation of a number of Americans that he had left Pennsylvania before it became a State, and that from the circumstances of his property in England, he could not have left that country during the war without hazarding the loss of his fortune, he had received a pardon of his treason: but his *property* was not restored to him. He now found himself in the position of a man who had sacrificed a large estate in the cause of revolution, and could get no recompence from either side. His counsel, Mr. Sylvester Douglass, writes to him that the decision of the British commissioners "arose from its appearing to them,—*probably by too much candour on your part,*—that your property in America might be recovered:" and Mr. Galloway, an able lawyer of Pennsylvania, who had left Philadelphia and joined the British side, writes as follows: "You told them, as you inform me, that you were determined to return to the new States and live there. Now I know the commissioners have carefully made the enquiry whether the claimant intended to desert his allegiance to the British government, and to become a subject of the States. *I therefore think, as you have*

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changed your mind and resolved to continue in this country a subject of the crown, you should communicate your resolution to the commissioners, if not already done." In 1787, after these letters of Mr. Douglass and Mr. Galloway, he presented another petition to the commissioners in which he states that in going to America, *he had little or no expectation of having his property restored to him, but was willing to make the experiment and take the burden from Great Britain if he could:* it not being his intention if he got compensation there, to ask it of England, and that he had not supposed that in making compensation, Parliament intended to restrict persons from going to their former places of residence, as assistance was promised to such as might be able to go back, and there endeavour to recover their rights and properties under the treaty. He concludes by stating that "*it is his serious wish and inclination to settle and fix in Great Britain.*" In 1788, he accordingly received a compensation of what was called *the third class;* a rate of reward inferior to those loyalists who stayed in America and suffered confiscation, after running every risque there and actively opposing the revolution. He was extremely indignant at the small allowance thus made him, and in 1789—six years after the peace—presented a fourth petition to the House of Commons representing his loyalty, sufferings, long residence in England, investment and centralization of his property there. He took it in person to the House and presented it to the speaker himself: but no notice was given to it. In March 1790 he made preparations for going to the United States, and before leaving London, executed a will which

In 1788, receives compensation from Great Britain as a suffering loyalist.

In 1790, makes a will in London: appoints American executors.

he left there and in which he appoints five executors, *all Americans, his relatives*, and describes himself as *formerly* of the City of Philadelphia, in the Province, now State of Pennsylvania, merchant, *now residing in lodgings*, No. 10, Great Russell street, London. By this will he left the *largest* portion of his property to his *American* relatives, but made also liberal testimonials of his affection for those in England, and added to it the following memorandum: "*It is my desire in case I should die in England, that my body be buried at Padiham church, in Lancashire, and a plain, handsome monument erected to my memory, with a suitable inscription thereon; that being the church where my grandfather and grandmother are buried at, and where all my fathers, brothers and sisters were christened.*" Before embarking he receives from one of his correspondents, "all good wishes for a fine passage and *a happy meeting with his friends in his native land.*" He reached America September 23d 1791. What was his precise object in coming here—if it is possible to say of such a man that he had a precise object in any of his actions—did not appear from the evidence. The confiscation of his property and the injustice of the act, early laid hold of his mind; and to his dying hour clung to it with the closest tenacity; occupying it more and more as the possibility of recovering his property here became less and less. He had also left some debts, which as an alien enemy he could not recover, and about the recovery of which it appears that he now occupied himself. Writing now to one of his English relatives, whom he addresses as an acquaintance of his early youth, and one who had always

Desires, if he dies in England, to be buried there, with his English ancestors.

Goes to Philadelphia in 1791, fourth time, and stays about eight months.

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shewn him attention, he says, in speaking of America, "I had the satisfaction to find my relations and friends in general well; the country is in a rising and prosperous way, and Philadelphia much improved by the addition of many handsome new buildings. Yet I am rather doubtful my return now is too late timed to stay;—from changes and alterations that circumstances make in parties. On looking over the directory, I found I scarce knew above three or four persons in a hundred. In some families I found girls I left in the cradle, grown up and married: Again in others, children I left just breached, and lads from ten to fifteen are grown up and settled;—among the latter some of the most rising merchants. In short, *from the revolution and an absence of fifteen years, my native land appears what I expected, almost an unknown country to me.* Being a lodger, and from the *upstarts,* I feel a sensitive difference between *my present* and *former conditions* here." He speaks in another letter of the fact, that his *friends in England expected he would return in the December packet,* which would have allowed a stay of but three or four months here, and says to his bankers there, that he don't think he will want any more money while he stays, noticing at the same time the fact, that the balance to his credit with them must be about £1200 sterling, which he did intend to invest, but now believes that he shall not. In the same letter he says: "I have lately discovered from an adjudged case* in 1781, that I could not lawfully be the object of an attainder, having left America and made my election before the government here was formed: where there was

* Respublica v. Chapman, 1 Dallas, 53.

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no law, there was no transgression. This had I known ten years ago, would have been of the first importance. From changes and combinations, *I am doubtful its now too late.*" While on this visit, speaking to an American acquaintance of his domicil or citizenship, "*he said he was a citizen of Philadelphia, and as long as his father and mother's bones were in the country he should so consider himself;* and desired that if he died in England or any part of Europe, he might *be brought home* and buried where his uncles and aunts were." He lodged during this visit with his half brother, and former partner in trade, Mr. Hartley. Making ready now to return to England, he deposited his family bible, in which he made some new entries—plate, about 250 oz.—a trunk of letters of no great value, and some clothes, apparently a court dress, in one of the banks. He then, 9th December 1791, made another will, by which after a few legacies to his American relatives and none to his English, he gave all his estate to his "heir at law," and appoints three American *executors*, one of them being the president for the time of the bank where he had made his deposite. This will was executed in the form usual in Pennsylvania, to pass all kinds of estates, but it would have passed nothing in England, but personalty. Arriving at Falmouth August 1792, after an absence in America of about ten months, he went into Lancashire and spent two or three weeks among his relatives in that vicinity. At Preston, he says, I met "with Wilson, *who I remember when a little boy there.* He is now about 70, and has been some years retired, and lives in the house I used to lodge at, which be-

Makes a will at Philadelphia, in December 1791: Appoints American executors, and returns to England in 1792.

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Visits his English relatives in Lancashire.

longed to his uncle. *I told him I had often been sorry my father had not left me there, and put me apprentice to a trade, or some good attorney, or cotton tradesman. It might have saved me many a painful and anxious hour. I also saw there my old master,* Shepherd, who is still a very hearty man, of 75 at least, *and continues teaching school in the old place he did the* 18*th January*, 1762. *All my intimate schoolmates I found dead or dispersed.* I saw there our country folks, Mr. and Mrs. Beach, and their pretty daughter—who talk of being in London this winter. From thence I went to Blackbourn, *where I met my cousin Mary Aspden*, that was now the widow Dyson, and a grandmother, *and many other relations who are, most of them, in much improved circumstances and in a prospering way.* Mary Dyson's daughter is married to her cousin *Mathias. They keep the 'Mathias' in the family;* one they tell me in every family." In June, 1793, he proposes to return to Philadelphia, if he can, in August, if not, in the spring; and in the same month directs that *the plate, which previous to his leaving Philadelphia he deposited in the bank, should continue there until his further order.* In March, 1795, he writes as follows to an American friend. "I flatter myself it will be convenient for me to return *to my native land* in the course of the summer. *Whatever views I might have had ten or twelve years ago, in returning, of reinstating myself again in my former business, no views of that kind will influence me at this time,* although very laudable: nor shall I be led by ambition. Offices I shall be glad to see well filled, but never wish to fill one myself, unless the duty comes

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in turn; I then should be ready to serve from the interest I have in the public welfare. *The principal inducement now, is a desire to live again among old friends in my native country, and if not a citizen of the United States to acquire the right of one.*" In 1796 he writes, "you may expect me, but *I cannot tell you when. Circumstanced without rights in England, I can neither well leave it, nor enjoy with satisfaction the property I possess in it.*" In 1798 he applies to the English Secretary of State for a passport, but is told that one "is not necessary for an American to leave this Kingdom." Insisting however on having it, he gets one, in which he is described as "*native and citizen of America.*" Giving an "account of himself" in the same year, "supposing he may come under the description of an alien in the Alien Bill," he says, "when in town, since my last return to England, I have resided in the lodgings I was lately in; *considering London as my home, from my property being on loan to Government, and from having business on that account there.*" In the same year he applies for and gets a license to reside in England, under the "Act respecting aliens resident in England," but at once makes upon it the following endorsement: "*An Englishman*, born within the *now* limits of the United States, apprehends that he is *improperly* called an *alien*, in this license, and also in a passport to embark for America last July, *from his not being a subject of the United States. Otherwise he would have applied to the American Minister for a license and passport.*" In the same year, he sets sail for America, embarking for Charleston, S. C. Finding the

In 1798 sets sail for Charleston, S. C., but gets ashore in Ireland and returns to England, and stays there four years.

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ship leaky, and seeing an account in the papers of a likelihood of war between the United States and France, and "being doubtful," as he says, "whether if he should be captured he would be exchanged by *either* side, *from not being a real British subject or real American citizen*," he got ashore in Ireland and returned to England; "where, *not being at liberty* to write to the American minister, *from not being an American citizen*, (the record in *Respub. vs. Chapman* being against him) he applied to the Secretary of State for a license to live in England." In the following year he sends a petition to the Lord Chancellor about his concerns, and describes himself as "*formerly of the city of Philadelphia*," merchant; *now residing in England*, a public creditor of more than twenty years, *limited in his residence, under the Alien Bill, to London, and the neighbourhood thereof;* but soon afterwards calls himself "The *Right Honorable Mathias Aspden of Philadelphia*," a title which he is led to give by way of "explanation," since "he has heretofore been described in the Books of the Bank as Mathias Aspden, *Esq.*, of different streets, *London*; and in those of the East India Company, as Mathias Aspden, *Esq.*, of *Richmond, Surrey:* and now proposes to return again to Philadelphia, his former place of residence, and wishes to show clearly that he is the same person." He resided in London till 1802, occasionally proposing to return to America, *but never coming.* In July, 1802, during the peace of Amiens, he went to the Continent with the intention, as he said, of embarking at some of the ports there, for *some part* of the United States, *but he did not embark.* In his

In 1802 goes to Italy, and in his Italian Passport is styled an "American."

passports at Naples and Rome, he is styled "*Americano.*" In February, 1803, he returned to Paris, and thence, in March, to London. In May or June, 1803, he writes that if his health, which is but indifferent, is not worse, he *intends to embark for America in the course of a few weeks;* but gives certain directions to his correspondents, in case he should not do so; which, it appeared, was finally the case. In February of the next year he still *talks* of embarking, and assigns as the cause of his delay, "the very extraordinary and hazardous times." In the spring of 1804 he went to Paris: in the summer returned to London, intending, he says, to sail for America, as he now found himself in better health than he had been, and had his affairs arranged. "*Could it have been foreseen,*" *he here adds,* "*that when I came to England in* 1792 *I should have remained so long, I should have made a tender of my services to the President in the diplomatick way;* flattering myself that I should neither been incompetent to the task, nor unworthy the trust." He did not sail, however, at this time, but, on the contrary, *remained in England for eleven years,* at which period he set sail, and reached Philadelphia in September, 1815. He had $12,000 on deposit there which had been there since March, 1811, besides a small deposit left in 1791 in another Bank. He stayed in that City some weeks, frequently visited the most reputable of his relations; not lodging with them, however; told an old negro servant of one of them that he *had been in this country and out of it, that it was the best country he had ever been in, and that he wished to lay his bones here;*

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In 1803 to Paris. Thence to London; having been on the Continent nine months.

Stays in England about a year; and goes again to Paris in 1804 for a few months and returns to England.

Stays in England for eleven years: and then, 1815, goes, for the 5th time, to Philadelphia.

Stays in Philad'a. some weeks.

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a wish that he repeated to another witness; presented a petition to the Legislature of Pennsylvania, in which he says that the confiscation of his property has caused a loss of £5000 to his heir at law in England; set off for the South, was taken ill, and remained there most of the time that he was in the United States; came again to Philadelphia, *took his plate out of the Bank*, left there, of his large deposit, $361, of his small one $43, *and set sail for England*, having been *twenty-two months*, in all, in the United States. In the year after his return to England, he speaks of his having been "*abroad in America.*" In 1806, '9 and '16, he had applied to the British Government to be exempted from paying a tax on his dividends there, urging that he was a *foreigner*, and says in one application that he was "*accidentally* in England." The commissioners reply that the tax is not deducted in favour of *foreigners residing constantly* within the British dominions. In 1819 feeling, as he says, uncertain, from the weak state of his health, how soon he could venture on a voyage to America, he determined to visit the baths in the south of France, but it does not appear that he ever did so. In April, 1824, he speaks of his intention to visit America in June of that year. Death, however, put an end to his projects and his history. He died August the 9th, 1824, at lodgings, at London, at the age of 76, and was buried in that city; having made no will since that of 1791, when he left the United States.

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Goes to the South, and is ill.

Returns to Phila-del'a, and takes his plate out of Bank.

Goes to England in 1817, having been 22 months in the U. S.

Dies at London in 1824.

His earlier correspondence was principally with his relations in America. After his second voyage to England, in 1792, he became so eccentrick, and

troublesome, about his concerns, and finally so hypocondriack and absurd, that most of it seems to have dropped: his correspondents would not reply. And after his visit of 1817 to Philadelphia, he says that he could not find any body there with whom he could safely leave a power of attorney. He had few visitors of any sort in England, and always lived at lodgings while there, as he also did after 1776, when in America. His correspondence was principally with his bankers, in England and America, through whom he did most of his business. He was constantly investing and re-investing money both in the United States and in England, rarely or never committing any absurdity in that particular. At the time of his death he had in the American funds about $85,000, in the English $200,000, and about $50,000 in those of France.

Among the papers found after his death in his trunk, was the usual printed list of the members, issued by the East India Company, with marks designating those persons capable of election to the Directorship; a privilege not allowed to American citizens. Mr. Aspden's name was among these.

Issues directed by the Court.

The issues directed by the Court were as follows:

1. Where was the domicil of origin of the testator?

2. Where was his domicil at the time of his making his will, December 6th, 1791?

3. Where was it at the time of his death, August 9th, 1824?

4. Where was it during the intermediate time, between December 6th, 1791, and August 9th, 1824?

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)R THE ENGLISH DOMICIL.

)ct. 18, 19, 20.

MR. WILLIAMS, MR. RANDALL and MR. W. B. REED, in favour of the English domicil. Mr. Aspden's own declarations on the subject of his domicil are so full of contradictions as to be of inferior weight in determining it. They appear to have been directed, during much of his life, solely by his interests, and to have been made in opposite ways at the same time. Towards the close of his life his mind became so greatly disordered—he was so entirely irresolute—scheming so idly every thing, and never executing any thing—that his declarations of intention, even if sincere, possess but little of the value to which such declarations are usually entitled; a value that is given to them only because they are usually followed by conduct conforming to them. The history of Mr. Aspden's life, his acts and his conduct are of much more importance.

He was born a British subject, and he lived for at least 72 years of the 76 of his life, under British allegiance and government. He received much of his early education in England. His father was not one of our early colonists, but came here in mature life, the first and last of his family who ever came at all. The ties of Mr. Aspden were close with England prior to the Revolution. While he still owed allegiance to George III, and before the State of Pennsylvania acquired any right to his allegiance at all, he leaves the State. He sells all his estate here that he can sell, and leaves a power to sell the rest. He transports his property to England, lives there, aids and abets its cause in an open and effective way. He is attainted of treason by this State: he is disgraced by it: all his property is confiscated

by it. He is protected, honoured and rewarded by the country in which he lives. With an exception of a visit of three weeks to this country, he now lives for fifteen years in England. During these fifteen years his former country has been changing in every respect. A Revolution—the work of seven years—had taken place, to begin with. From a British Colony it has become an American Sovereignty. From a royal government, it has become a republick. Feeble in every respect when he left it, it is now formidable among nations. Its affairs had been in the hands of his friends: These are banished to England, and the government is usurped by enemies who have attainted his person, and confiscated his estates. His paternal abode is desolated, and has passed to strangers' hands. In looking into the directory, he could not recognize more than four names in any hundred: and his native land appears "almost an unknown country." He goes back to England. Unlike America, it is unchanged in every thing. He visits his relatives with satisfaction. The scenes of his youth greet him with familiar sights: and he "finds his old schoolmaster, Shepherd, still teaching school in the same place he did in 1762;" thirty years before! He lives in England for three and twenty years. At the end of that long time he visits the United States, and asks a restoration of his property, by the confiscation of which his "heir in England had suffered loss." He fails to get it. He goes back to England. There, forever after, he lives. That country is the centre of his affairs. Upon its faith—running into distant years—he places the bulk of all his wealth. There

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he dies: there he is buried and rests. Who, on such a case, will say that Mathias Aspden wished to die, or did die a Citizen of THE STATE of Pennsylvania, domiciled in Philadelphia?

The evidence presents some indicia common to both sides of the question; and some usual ones are wanting to either side. Aspden kept papers and made wills in both countries,—the American will being operative only because it was the latest. He called himself sometimes an Englishman, sometimes an American. He received his education partly here, partly in England. He owned no real estate, and had no mansion-house, nor immediate family.

Let us look then at the remaining indicia. I. Those in favour of the English domicil. II. Those in favour of the American. In support of the former,

1. *Length of time:* Mr. Aspden passed 28 years of his life, the early part of it chiefly, in America. The residue—48 years—he passed in England. Granting that his original purpose in going there was to save one of his ships, it can't be pretended that this remained his object—his sole object—forever afterwards. The doctrine of special purpose don't apply at all, even if it could apply to a case where two-thirds of a long life were given to following out such an object. A special object which occupies a whole life, becomes a general object. There is nothing like special purpose; that purpose whose type is found in the merchant engaged in a limited and special venture, the student residing to prosecute studies, the suitor prosecuting a law suit, or the officer acting in a special service. Mr. Asp-

den was in England, and there was the end of it. He was there, either with an intention of indefinite residence, or he was there without strength of will enough to form any intention. There was nothing to prevent his coming to America at any time. He had no business whatsoever in England, nor ties of any kind which need have kept him there. His money was in the funds: it needed no supervision: it gave no concern. Though fear of punishment—a groundless and absurd fear—prevented his remaining here in 1785, even such fear had vanished in 1791, and is never again mentioned by him. The case then is one of a man who having no special object in staying in a country, stays there notwithstanding; of a man, perhaps, who has no real intentions at all; or—at a large concession—of a man who wishes to keep the domicil *doubtful* In such a case, TIME is an element almost conclusive. Of the effect of it in this connexion, we have an opinion from Lord STOWELL, a judge of exquisite conceptions of justice, of learning the most accurate and extensive, and one who had an acquaintance with this class of questions more intimate than any man who ever sat upon the seat of Judgment. With other judges, these questions have received occasional consideration. With him they were the study of his whole life, and he was aided in them by the labours of other men who made them the whole study of theirs. He gave utterance to nothing crude, nor to anything not practical. His language is text, his decisions law. "Of the few principles" he says,* "that can be laid down generally, I may venture to hold that *time is the grand ingredient in*

* The Harmony, 2 Robinson's Admiralty Rep. 266 Am. ed. 1801.

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constituting domicil. I think that hardly enough is attributed to its effects; in most cases it is unavoidably conclusive: it is not unfrequently said, that if a person comes only for a special purpose, that he shall not fix a domicil. This is not to be taken in an unqualified latitude, and without some respect had to the time which such a purpose may or shall occupy; for if the purpose be of a nature that may, probably, or does *actually* detain the person for a great length of time, I cannot but think that a general residence might grow on the special purpose. A special purpose may lead a man to a country where it shall detain him the whole of his life..... I cannot but think that against such a long residence, the plea of an original special purpose could not be averred: it must be inferred in such a case, that other purposes forced themselves upon him, and mixed themselves into his original design, and impressed upon him the character of the country where he resided..... I repeat that time is the great agent in the matter: it is to be taken in a compound ratio of the time and the occupation, with a great preponderance of the article of time: Be the occupation what it may, it cannot happen, but with few exceptions, that mere length of time shall not constitute a domicil." This doctrine is approved by Mr. Phillimore;* and is said by him to be "universally true of all kinds of domicil." The translucent wisdom of Lord Stowell is, on this point, but in harmony with "the majestick sense of Thurlow." "A person's being at a place," said the Chancellor, in *Bruce* vs. *Bruce*,† "is *prima facie* evidence that he is domiciled at that place. A British man settles as a merchant abroad: *he en-*

* On domicil, 145.

† 2 Bosanquet & Puller, 229, n.

joys the privileges of the place: he may mean to return when he has made his fortune, but if he dies in the interval, will it be pretended that he had his domicil at home? In this case Major Bruce left Scotland in his early years: he went to India, returned to England and remained there for two years, without so much as visiting Scotland: and then went again to India, and lived there sixteen years and died. *He meant to return to his native country,* it is said; and let it be granted. He *meant* then to change his domicil, but died before *actually changing it.*" In *Butler* vs. *Hopper,** the plaintiff came from South Carolina, where, as well as in Georgia, he had a valuable plantation which he cultivated, and on which he had a furnished house and servants. He visited them every year. From 1794 to 1806, he resided in Philadelphia, with his family and several children, and during the whole time, nearly, was representing South Carolina, either in Congress or in the State Legislature. Yet on a question of jurisdiction, the court held that his residence in Philadelphia fixed his domicil in that State.

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* 1 Washington's Circuit Court Reports, 500.

In Elbers & Kraffts v. *The United Insurance Co.*† the Supreme Court of New York say, "The fact of a person residing in a country for a considerable period, leads to the conclusion that he has adopted it as his residence. If the real fact be otherwise, he alone can shew it. "It is not necessary," said Chief Justice Heston of Maine,‡ in speaking of the requisites to constitute domicil, that a man should go to a place "with a fixed resolution to spend his days there..... Men may and do acquire a domicil wherever they establish themselves for

† 16 Johnson's Reports, 128.

‡ Green v. Windham, 13 Maine Reports, 225, 228.

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the time being, with an intention to remain until inducements may arise to remove." Chief Justice Parker, of Massachusetts, in commenting upon Vatel's definition of domicil, "the habitation fixed in any place *with an intention of always staying there*, says,* that a better definition—one better suited at any rate to the circumstances of this country is, "the habitation in any place *without any present intention of removing therefrom.*"

*Putnam v. Johnson, 10 Massachusetts, 488, &c.

2. *The effect of allegiance:* This is an element peculiar to this case. Mr. Aspden, when he left Pennsylvania in September 1776, was a British subject, and owed allegiance to the King of Great Britain. Before Pennsylvania came into existence as a State at all Mr. Aspden was out of it. He had a right to make his election, and he shewed by his acts that he preferred to follow his original allegiance. In fact the State *twice* renounced him as a subject, and he *twice* renounced the State as a sovereign. From the 28th September 1776, he was an alien enemy. As evidence of intent to assume a British domicil—the ground which we principally assume in adducing it—this is a fact of potential influence. The transition from one domicil to the other, was most easy. There was nothing immiscible between the characters of a British colonist and an English subject. There was much that was so between those of a royal colonist and a republican independant. Mr. Aspden then was but following a natural current. Except that he was not upon the same *soil*, England, after the revolution, was more like his former home than America itself. It therefore bears no resemblance to the case—which will be re-

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lied on by the other side of the Marquis de Bonneval—of a Frenchman acquiring a domicil in England, a case—not to speak it profanely—somewhat resembling that which Sir W. Scott thought difficult to presume, of a British Christian acquiring a Mahomedan domicil. But independently of *intention*, we beg to ask where there is a case of any native born subject leaving a revolting province, whose revolt terminates in independence, and living in the *parent* country ever afterwards, who has yet been considered as retaining his former domicil? How can a man have a domicil in any country with which he is in active, open, *lawful* war? He had not a dollar of property in America, nor, if he had not made his election, a single right there, except the right of being hanged or the right of being shot.

3. *The centre of Aspden's affairs, the seat of his fortune, was London.* His business, so far as he had any business, was investing money. His principal investments were in British funds. He had some in America, as he had some in France; but London was the place where he invested the bulk of his estate; and whence he superintended it all. A portion of his property was in Spanish bonds; a security not known nor marketable on American change.

4. Though he did *speak of coming to America*, and did come to it on three different occasions, there is nothing, either in his declarations of intentions or in his acts, after his return to England in 1792—certainly not after his return there in 1817—to shew that he meant to reside *permanently in the United States:* After his return to England in 1817, he speaks of his having been "abroad," in America.

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When he left Philadelphia in 1817, he took away with him the plate—the last remnant of his chattels personal in America—which he had left there for 26 years before; leaving nothing but a will and some old papers of but little value. He left a small deposit in bank, just as he had left a very large one in England, which he now goes back to manage: *and he never returns to America again.*

5. *His political rights*, so far as he chose to exercise any, were English: He is enrolled, with his knowledge, it would appear, among the persons capable of being managers of the East India Company, a privilege which is not granted to American citizens.

6. *Description in legal documents.* In many papers he is described as "*formerly* of Philadelphia *now* of London." His being described in passports as an American, is accounted for by the fact that it was on the Continent, just after the peace of Amiens, when the title of an American was a guaranty of civility and safety, and that of an Englishman a warrant for detestation and rudeness. It is of the least possible significance. An Italian consul would call him any thing which he called himself, and was willing to pay for.

7. *Place of death.* "A man," says a leading case on domicil,* "is prima facie domiciled at the place where he is resident at the time of his death: and it is incumbent on those who deny it, to repel the presumption of law." Mr. Aspden died in London, not while passing through there, but after a residence there for 48 years.

* Guier v. O'Daniel, 1 Binney, 349, n.

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II. The only criteria in favour of the English domicil are,

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1. *The place of birth.* We admit that the British Province of Pennsylvania was his domicil of origin, but that province no longer existed. Its soil was there, but it was deprived of all that had once made it lovely. Its institutions: its people: its conditions: its prospects were all changed. Mr. Aspden knew nobody here; nobody here knew him: What knowledge had he when he died, of the place of his birth? what of its passing concerns? How often did he ever greet its people here or any where, or walk its streets, or look upon its mansions? With London, its resorts, its ways, its walks, its men and manners, its events of every hour, he was as intimate as any native of London could be whose habits were as sequestered as his own. It was his home unless he was a vagabond. It was his home above all other places, however less it may have been his home, than it might have been, or than it necessarily is to most of its inhabitants. The place of birth is powerful, but it is not omnipotent. It can't control time, allegiance, property and a long, consistent course of action. That would put an end to all questions of domicil by resolving them all into questions of birth. "A person's origin," said Lord Thurlow,* "is to be reckoned as but as *one circumstance* in evidence which may *add to other circumstances*, but it is an enormous proposition that a person is to be held domiciled where he drew his first breath, without adding something more unequivocal." Lord Loughborough† laid "the least stress" upon the place of birth taken alone, *though in conjunction with the place of education and connection*, it had great weight.

* *Bruce v. Bruce*, 2 Bosanquet & Puller, 231, n.

† Bempde v. Johnson, 3 Vesey, 202.

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2. *His expressions of intention to return to America.* Mr. Aspden's declarations of intention—to say nothing of the fact that there are about as many one way as the other, and that they were dependant upon contingencies, (as of health) which never occurred—are shewn by his history through a long series of years, to have had scarcely any connexion or correspondence with his conduct. If they existed at all, they were without the evidence of any overt act: they were residing secretly and undistinguishably in the breast of the party, and liable to be revoked every hour. Lapse of time, country of allegiance, place of residence, seat of fortune, place of death and burial, therefore, all act with their natural and uncircumscribed force. In *Stanley* v. *Bernes*,* it was proved that Mr. Stanley, who resided for a long time in the Portuguese dominions, frequently described himself as a British subject, and often expressed it as his most ardent wish to lay his bones in his native soil: speaking with abhorrence of being buried where he then was. He often spoke also with affection of the English religion, and with disgust of the Roman Catholick: and it was proved that in expectation of an invasion by the French, he had transferred his property, by way of safety, from his own name to his son's, who was born in Portugal. On his death, moreover, he was buried in the English burying ground, and his will was taken possession of by the British consul in the way usual with the wills of English subjects alone. But the High Court of Delegates considered that all his declarations of intentions were outweighed by his residence of fifty years in Portugal. *This was a case of succession.*

*3 Haggard's Ecclesiastical Reports, 392.

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It was part of the case of *Bruce* v. *Bruce*,* that in many letters Major Bruce "had expressed an anxious desire to return and spend the remainder of his life in his native country; particularly he wrote to that purpose a few months before his death, and he was in the course of remitting home his money when he died." But the House of Lords held, that as he had been domiciled in India, and as he was not actually on his way to Scotland, and had not any fixed and settled intention to return there *at any particular time*, India must be considered as the place of his domicil. In the case of De Bonneval,† the marquis had spoken of England as his home, and frequently expressed his preference for a residence there. "I do not, however consider" said Sir Herbert Jenner, in giving his opinion on the case, "that the *declaration* made by the deceased at different times, that he preferred a residence in this country, can be a ground upon which the court is to rest its judgment: the domicil cannot depend upon loose declarations of this sort, where there are documents which shew that the party looked to France as his home." If documents, as Sir Herbert Jenner says, be stronger than declarations, certainly *facts*, (which we have in this case instead of documents,) are stronger than either. In the case of *The Venus*,‡ (where a citizen of the United States established his residence in England, between which and the United States war suddenly broke out, and his property was captured by an American ship, before he could have acquired any knowledge of the war,) the majority of the Supreme Court refused to hear evidence at all, of the party's mere *declarations* of

* Cited *ante*. p.

† Curties, 868.

‡ 8 Cranch, 253-281.

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intentions to return. "Mere declarations of such an intention," said Judge Washington,* in delivering the opinion, "ought never to be relied upon when contradicted, or at least rendered doubtful by a *continuance of that residence which impressed the character*. They may have been made to deceive, or, if sincerely made, they may never be executed..... But when he accompanies those declarations by *acts*, &c." This, it may be admitted, was a rule of policy, but it was a rule of policy founded upon the fact that intention is a thing easy to be counterfeited; easy to be assumed whether it exist or no; and that in doubtful cases *it must be proved by acts and not by declarations*.

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*8 Cranch, 281.

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Mr. Tilghman, Mr. J. M. Read, and Mr. H. D. Gilpin on the other side: The most important question here is, "what is the legal meaning of domicil? Among French jurists Vatel defines it,† "a fixed residence in a place, with an intention of always staying there, made known by a declaration, express or tacit." "He who stops," he adds, "even for a long time in a place for the management of his affairs, has only a simple habitation there, but has no domicil." *Dargentré*, "a civilian of high authority," defines it‡ negatively in saying, that "they who have no intention of fixing their abode in a place, but are absent somewhere for *convenience*, *necessity* or business, cannot, by any lapse of time, create a domicil, cum neque animus *sine facto, neque factum sine animo ad id sufficiat*." Boullenois says,‡ "a man cannot be said to *belong* to a place unless he be then in the spirit and meaning of abiding there." Among Ger-

† Droit des Gens, L. 1; c. 19; § 218.

† Quoted in Phillimore on Domicil, 11.

‡ id. 13

man jurists, Wolff calls it* a fixed habitation in a certain place with the intention of remaining there. Forcellini† among the Italians, says "domicil is the home, the seat of domestick life, *the residence which is certain and permanent.*"

* Jus Gentium, c. I, § 137.

† Quoted in Phillimore on Domicil, 14, *n*

"A domicil then," says C. J. Marshall,‡ "in the sense in which this term is used by Vatel, (and the same remarks applicable to the definitions of other jurists) requires not only actual residence in a foreign country, but *an intention of always staying there.* Actual residence without this intention amounts to no more than simple habitation. . . . . *The intention which gives domicil is an unconditional intention to stay always.*"

‡ Dissenting opinion in The Venus, 8 Cranch, 290.

Domicil means then, we say, a man's *permanent* residence known to be such by his *declarations and acts*, which he has *no intention of leaving*, and which he regards as *his established home.*

The definition of domicil generally being settled, we say that DOMICIL of ORIGIN—by which is meant the place of birth and immediate connexions, the place in which, according to the Roman law, a man is born or *ought* to be born—that this domicil subsists during minority and until the person has legally the will to change it by arriving of age. It is a domicil fixed by law, what the law calls a necessary domicil, and, quite independently of the *parties'* will, attends him through his minority. The Supreme Court of Pennsylvania¶ states this matter with legal precision, as well as with force and beauty of sentiment. "No infant who has a parent, sui juris, can in the nature of things have a separate domicil.

¶ School Directors v. James, 2 Watts & Sergeant, 571.

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This springs from the Status of Marriage which gives rise to the institution of families; the foundation of all domestick happiness and virtue which is to be found in the world. The nurture and education of the offspring make it indispensable that they be brought up in the bosom and as a part of their parents' family, without which the father could not perform the duties he owes them, or receive from them the service that belongs to him. In every community therefore they are an integrant part of the domestick economy, and the family continues for a time to have a local habitation, and a name after its surviving parent's death. The parents' domicil therefore is consequently and unavoidably the domicil of the child."

This domicil of origin remains through life unless a new one is acquired by the positive act of the party, in abandoning it, and taking, *animo et facto*, another as his domicil. A leading case on this subject is a recent one, that of *De Bonneval v. De Bonneval** The Marquis De Bonneval was born in France in 1765, of French parents, lived there till the revolution in 1792, came to England, stayed there till 1814 or 1815, received an allowance as a French emigrant, returned to France with the Bourbons in 1814, returned to England on Napoleon's return in 1815, but after his defeat went immediately back. After that time until his death, in 1836, he was occasionally living in one country and the other: he had a house in England on a lease of 44 years, bought in 1820: he died there, having made a will in each country, the last one being in France. He was held to be domiciled in *France*. The Court

* 1 Curteis, 856.

said: "Having first ascertained the *domicil of origin, that domicil prevails till the party shall have acquired another with the intention of abandoning the original domicil.* The *acquisition* of a domicil does not simply depend on the *residence* of a party; the fact of residence must be accompanied by an intention of permanently residing in the new domicil and of abandoning the former; in other words, the *change of domicil* must be manifested, *animo et facto*, by the fact of residence and *intention to abandon.* Again, the presumption of law being that the domicil of origin subsists until a change of domicil is proved, the *onus of proving the change* is on the party alleging it, and this onus is not discharged by merely proving residence in another place, which is not inconsistent with an intention to return to the original domicil; for the change must be demonstrated by fact and intention. "I do not consider," said Sir Herbert Jenner, "that the declarations made by the deceased at different times, that he preferred a residence in this country (England) can be a ground upon which the Court is to rest its judgment; the domicil cannot depend upon loose declarations of this sort, where there are *documents* which shew that the party looked to France as his home. Unless the evidence was nicely balanced, the Court would pay no regard to such declarations, shewing a *preference* for a residence in this country; and not a decided intention to *abandon his native* land and take up *his sole residence* here."

Sir Herbert, in delivering the opinion of the Court, alluded too to the circumstance that this residence in England, in the first instance, was because

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the Marquis *was compelled to leave France by the revolution;* he did not come with the intention of taking up his permanent abode in England and abandoning his domicil of origin, that is, to disunite himself from his native country. A continued residence in England was not sufficient to produce a change of *domicil of origin.*

* Quoted in Phillimore on Domicil, 58.

In the case of *Sautereau,** he had his *domicil of origin in Burgundy,* he left there in his minority, never returned, but died in another province of France. Yet his domicil at the time of his death was held by the French Lawyers to be Burgundy, *because* he was first sent from there in the capacity of a steward or servant, and under one person and another, continued to act in the same capacity till his death. As there was *no intention of permanent change,* his domicil of origin remained.

† 3d Curteis, 435.

In the case of *Craigie v. Levin,*† the Court said that where the question of domicil at the time of his death, was in *equilibrio,* the *place of birth and origin* might have turned the scale.[1]

‡ 5th Vesey, 750.

In *Somerville v. Somerville* ‡ the Master of the Rolls said: "The original domicil, or, as it is called, the *forum originis* or the domicil of origin, is to prevail until the party has not only acquired another, but has manifested and *carried into execution an intention of abandoning his former domicil, and taking another as his sole domicil.*

What then constitutes such a change? Nothing but the absolute *abandonment* of the former domicil, and the taking of a new one *animo et facto.*

Thus, where one whose domicil of origin was Hanover, went to Hamburg and lived there ten years, carrying on mercantile transactions, and then went to Paris where he died a bachelor, leaving his property at Hamburg; Hanover was held by Grotius and other Dutch lawyers* to be his domicil at the time of his death, because he made no declaration of intending to change his domicil of origin.

* Quoted in Phillimore on Domicil, 103.

In *Munro* v. *Munro*.† Sir Hugh Munro was born in Scotland, and resided there till he came of age in 1784: for the next four or five years he visited France but always returned to Scotland, though not to his family mansion. In 1794 he went to London, took a house there, formed an illicit connexion with a woman whom he afterwards married. A daughter was born, while they were thus living in London, but before the marriage. In 1802 they returned to Scotland. The question was as to his domicil at the time of his child's birth. Had he changed his domicil of origin, which was Scotland, so as to establish a new domicil in England while he lived there? Seven out of thirteen of the Scottish judges thought he had: and that England was his domicil. But the English House of Lords reversed the decision on the express ground that to constitute a change of his *domicil of origin*, he must not only have acquired another residence, but coupled it with the intention of *making it his sole residence*, and *abandoning* his *domicil of origin*.

† 7th Clark & Finnelly, 842.

Nor does the circumstance of a person's *death* at a place different from his domicil of origin, of itself, afford more than a slight presumption, and one to be explained, that it had become his place of residence.

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In the case of *Johnson* v. *Beattie*,* though the party (a Scotch lady,) went to England on account of her health, stated she expected to die there, and gave directions that her body should be buried there, still as it did not appear that she had *abandoned* her residence in Scotland, this fact was not held to establish a new domicil in England.

* 10th Clark & Finnelly, 138.

† 1st Binney, 349.

In our own case of *Guier* v. *O'Daniel*,† Guier, who was a seafaring man, died abroad, but his domicil was held to be at Wilmington, which was his *domicil of origin*, and which it was held that he had never relinquished.

It is true that in questions of commercial domicil, *time* is not only an important element, but generally a conclusive one. Intention is often of no moment at all: the party's acts settle every thing. That at least is the English law. The case of *The Harmony*, from which Sir W. Scott's opinion is quoted on the other side, was a case of commercial domicil, not of domicil for succession. And even in cases of commercial domicil, the English courts have gone further than the continental jurists, and further, it is probable than we have. Chief Justice Marshall, in speaking of the decisions of Sir William Scott says,‡ "it is impossible to consider them attentively, without perceiving that his mind leans strongly in favour of captors..... In a great maritime country, depending on its navy for its glory and its safety, the national bias is perhaps so entirely in this direction, that the judge, without being conscious of the fact, must feel its influence. However this may be, it is a fact of which I am fully convinced: and on this account it appears to me to be the more proper to *investigate*

‡ Dissenting opinion in The Venus, 8th Cranch, 299.

rigidly the principles on which his decisions have been made." Mascardus ("himself no mean authority," says Mr. Phillimore,) tells us* that he was taught by the chief of all interpreters of the law, by Bartolus, that *where a person retained the intention of returning to his former domicil, a thousand years would not suffice to establish a new one.* Locré speaks† of a case decided by the Parliament of Paris, where a person who had been absent for *fourteen* years, retained his domicil by a correspondence *intimating his intention to do so.* According to the Sardinian code,‡ it appears that "no domicil in a foreign country, however long and permanently established, will, of itself avail to prove that the person establishing it had abandoned the intention of returning to his native country, and so incurred the forfeiture of his civil rights." In short, the true doctrine of change of domicil for purposes of succession, is laid down by the judge of the Prerogative Court in a recent case:§ "Length of time will not, alone, do it: intention alone will not do it; but the two taken together, do constitute a change of domicil."

* Quoted in Phillimore on Domicil, 148.

† id. 148.

‡ id. 160, n.

§ Collier v. Rivaz, 2d Curteis, 859.

In a country so greatly and extensively commercial as the United States, the courts which administer the law of nations, will be careful not to establish principles in conflict with the national policy. Chief Justice Marshall, who looked at these matters with the comprehensive eye of statesmanship, not less than with the close observation of the logician, says:‖ "Nothing can be more obvious than that the affairs of a commercial company will be transacted to most advantage by being conducted as it respects both purchase and sale, under the eye of a person, inter-

‖ Dissenting opinion in The Venus, 8th Cranch, 293.

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ested in the result. The nation who takes an interest in the prosperity of its commerce, can feel no inclination to restrain its citizens from residence abroad for the purposes of commerce, nor will it hastily construe such residence into a change of national character to the injury of the individual. It is not the policy of such a nation, nor can it be its wish, to restrain its citizens from pursuing abroad a business which tends to enrich itself."

A maxim of the law is, that *native domicil easily reverts*. The foreign domicil being adventitious, *de facto*, and somewhat unnatural, prevails only while it is actual and complete.*

* 1st American Leading Cases, 561.

To apply these principles to the case of Mr. Aspden.

Mr. Aspden's domicil of origin was Philadelphia. His father was a settled inhabitant there and died there. Aspden was born there, and lived there—a housekeeper and house owner—until the revolution. There is no evidence that when he left Philadelphia in 1776, he designed to *abandon* his American domicil and to *acquire a new one in England*. If he did not leave Philadelphia on a special purpose, he left it at least as a person who was unsafe in it during a civil war. At the worst, he was in a condition similar to that of the "exile" or "prisoner," who, says Denisart,† "are never presumed to have lost their design of returning, no matter how long a time may have passed since they were originally placed under the restraint." He came back again in 1785, the earliest date possible after the peace, and did not stay, only because he was in *bodily terrour*, not be-

† Quoted in Phillimore on Domicil, 88, n.

cause he wished to *abandon* the country. Other persons thought that his fears were chimerical: whether they were so or not it is difficult now to decide; he himself thought them well grounded, and there is no doubt that they were real. His absence till 1791, was therefore in a measure a constrained or enforced absence. There is no case that decides if a man through terrour—even though a vain terrour—leaves his country, that he also loses his domicil for purposes of succession. Mr. Aspden was not absent six years after his second departure in 1785, before he returned again: and made in 1791 a will, executed, not according to English forms, but according to the forms of Pennsylvania. He appoints three executors, all of them American; and makes such a provision as to one of them, that the will could never be without an American executor, nor his estate ever require any sort of *administration*. He thus guards effectually against any Englishman's taking possession of his effects, in case of his death in England. He leaves that will here: lived with it as his last will, and died with it as his last will. He is not abroad in England two years, before he expresses his intention to return again to America, and directs his plate not to be removed from the place where he left it; and in six years afterwards, 1798,—having constantly made mention of his intention to come here—he does actually set sail for America, and would have arrived, had not the ship proved dangerous to such an extent, that he deemed it necessary for his life to get ashore in Ireland. He remains in England only four years more, before he leaves it, in 1802, for the Continent. He declares that his

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purpose in going to the Continent was to set sail for the United States. Whatever his purpose really was, it is certain that the continuity of his English residence was destroyed; and he styles himself and is styled in Italy, "an American." He stays nearly a year *on the Continent.* In 1804 he goes to Paris; again breaking the thread which the other side treats as continuous and unbroken from its origin. A few years after this, in 1808, the relations between the United States and England became unsettled and uncomfortable: War is actually declared in 1812, and lasts till 1815, during all this time he is much safer in England than in crossing the ocean; being, as he says, in danger if he came here, of being captured both by French and American cruisers. Peace is made, February 1815, and *in September of that same year, almost as soon as it was possible for him to cross the ocean safely, he is again in Philadelphia.* He remains in the United States two whole years: and when he leaves the country he still leaves his will behind him here. Soon after returning to England, he expresses his design of coming back to the United States, and no doubt would have come a sixth time had not his death intervened.

Now is there any thing in all this to control that rooted principle of law, that domicil of origin remains until the party has actually *abandoned* it? abandoned it, *animo et facto* and acquired a new one. Mr. Aspden did not remain continuously in England. He was roving about—a wanderer free—in various countries—in different hemispheres, and upon the ocean that divides them.

Even had he, by lapse of time, lost his original domicil in 1815, the only time at which it can be really supposed that he lost it, that domicil was resumed by his residence of two years in America in 1815–16–17. It is unimportant that he did not reside continuously at Philadelphia during these two years. He resided no where continuously. He was a bachelor, with no liens, no affections and with neither capacity or disposition, it is probable, to fix himself anywhere. Had he died in America on this visit, would any question of domicil ever have arisen?

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For the American Domicil. Oct. 17, 18, & 20.

Mr. Aspden was an irresolute and most *procrastinating* man: his intentions of coming to America were perfectly real, but he wanted energy to execute them *promptly*. In each one of his last four departures from England, he had been declaring for years his intention of coming, before he actually came: he *delayed* the execution of his intentions, but he executed them in the *end*. So for some time before his death he was getting ready to return. He was irresolute—not about the fact of his return, but about the exact time. He delayed, deferred and procrastinated, just as he had done in the four cases before. But no question, had he lived, he would ultimately have arrived a fourth time—just as he had done three times before.

The Court. October 23d.

Grier, J. Domicil is a word which we have adopted from the Roman or civil law, but which it has been considered so difficult to define with precision and accuracy, that an eminent writer* on the subject was unwilling to hazard a definition, and

* Bynkershoek.

Oct. Sessions, 1848.

therein has been commended by a learned English Judge* for his wisdom.

The Court. October 23d.

The Roman codes described domicil as follows: "In whatever place an individual has set up his household gods and made the chief seat of his affairs and interests; *from* which, without some special avocation he has no intention of departing; *from* which when he has departed he is considered to be from home; and *to* which, when he has returned, he is considered to have returned home. In this place there is no doubt whatever he has his domicil."†

* Lord Alvanley, 5th Vesey, 750.

† Quoted in Phillimore on Domicil, 11.

It would tend rather to confuse than to elucidate the subject, to notice the many other attempts at definition of this word, and to attempt to point out their several merits or defects. It may be correctly said, however, that no one word is more nearly synonymous with the word domicil, than our word "home." The definition given by the late Judge Rush of this city,‡ which has received the approbation of an English writer§ on this subject, combines, it is probable, accuracy with brevity beyond any other. He defines it "a residence at a particular place, accompanied with positive or presumptive proof of an intention to remain for an unlimited time."

‡ Guier v. O'Daniel, 1 Binney, 349, n.

§ Phillimore.

‖ Conflict of Laws, § 44.

Two things, says Judge Story,‖ must concur to constitute domicil. *First:* Residence. *Secondly:* The intention of making it the home of the party. There must be the fact and the intent, and in many cases actual residence is not indispensable to retain a domicil after it is acquired, but it is retained *animo solo*, by the mere intention not to change it, or adopt

another. If therefore a person leave his home for temporary purposes, but with an intention to return to it, this change of place is not, in law, a change of domicil.

There are few subjects presented to Courts for their decision which are surrounded with so many practical difficulties as questions of domicil. The residence is often of an equivocal nature; the intention extremely obscure, and has to be gathered from acts and declarations oftentimes conflicting and contradictory. It is probable, however, that there is not a case to be found in all the books which presents more difficulties arising from this cause than the one before us. The testimony fills an 8vo. volume of nearly 900 pages. You have the whole history of the life of Mathias Aspden, all that he did, much that he said, and much more that he has written. Indeed it would seem, that being a man of much leisure he had spent a great part of his life in writing documents which bear—some indirectly, and many directly—upon the very question which you are called on to decide. And with an obliquity of genius rarely exceeded, he has enveloped it in so much contradiction and confusion and obscurity that it will require your utmost attention and the vigorous exercise of all your powers to solve the question.

On the first point submitted to you there is no doubt. The *domicil of origin* of Mr. Aspden was Philadelphi[illegible] British province of North America.

The ne[illegible] be: Did the testator ever [illegible]ange th[illegible] acquire another;—a domi-

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cil of choice as distinguished from his domicil of origin? And this is the great question in the case.

The Court. October 23d.

In the consideration of it the following rules must be observed:

1. That although a man may have two domicils for some purposes, he can have *one* only for the purpose of succession.

2. That the original domicil, or *forum originis*, as it is called, is to prevail until the party has not only acquired another, but has manifested *and carried into execution* an intention of abandoning his former domicil, and taking another as his sole domicil. A man cannot be considered as a vagabond, or a person without any domicil; for the domicil of origin is not abandoned until a new one has been *intentionally and actually* acquired.

3. That in order to acquire a domicil of choice, the fact of residence must be coupled with the intention to abide an indefinite time, or make the place his home. But the shortest residence with such an intention is sufficient. A residence in one place for a great number of years is a violent and continuing proof of the *animus manendi;* yet if it clearly otherwise appear that such residence was without such intention, it would be of itself insufficient to constitute such domicil.*

4. That the burden of proof lies on him who asserts a change of domicil.

* This remark, the Court observed, might not be correct to this extent, in cases of commercial domicil in time of war, or of matrimonial, forensick or political domicil in time of peace; but was to be received as correct in its application to cases of testamentary domicil.

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5. That the domicil of origin *easily reverts*, and that it requires fewer circumstances to constitute domicil in a native subject or citizen than to impress the national character on one who is originally of another character. The acquired domicil, however, must be finally abandoned before the domicil of origin can revert.

6. A fugitive from his country on account of civil war still retains his domicil, unless he shows an intention of a total abandonment of his country by the acquisition of a new domicil of choice. Nor will the confiscation of his property by the new government, in the case of a revolution effected after civil conflict—nor the attainder of his person—of themselves, put an end to his domicil of origin. If he elect to adhere to the old sovereign or government, looking forward with hopes of its re-establishment, his domicil of origin is not necessarily abandoned by such election. Allegiance to the existing government, or the exercise of political rights, constitute no part of the definition of domicil. These facts may nevertheless be of great importance in judging of the intention. Consequently, adherence to the king of Great Britain in our revolutionary war, although it might have caused the forfeiture of the life or property of an American citizen, was not, of itself, an abandonment of his domicil. The estates of those persons who fled from England with the Stuarts and died in France, were administered by the French Courts according to the law of England as their domicil.

Keeping in view these principles, you will inquire whether Mr. Aspden ever acquired a new domicil of

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choice. It is admitted that he left Philadelphia, his domicil of origin, in 1776 and went to England, where—with the exception of two or three years spent in the United States and in journeys on the continent of Europe for health or amusement—he lived until his death in 1824. The actual habitancy being thus clear, the question then depends on *intention*. Did he go to England with the intention of making it his home? If not, did he at any time while there, change his intention so that the *animus manendi* concurred with the act of habitancy, so as to consitute a change of domicil? The leading fact that he spent the greater part of his life in England and died there, raises a violent presumption that his intention corresponded with his acts. But as I have before said, in questions of succession even forty-eight years spent in a foreign country may possibly be accounted for, and the inference drawn from length of time rebutted.

[The court then gave a detailed history of the evidence, essentially as the reporter has presented it in his statement of the case.]

Without expressing any opinion on Mr. Aspden's intention, I may say that the testimony is full of contradictions: and would afford clear ground for a verdict either way, if the testimony on the opposite side be left out of view. As it is, the question is susceptible of much doubt.

Previous to the testator's return to England in 1785, there is no sufficient evidence, I think, of an intention to make England his home. Between 1785 and 1791, when he returned a second time to Philadelphia, there are declarations both ways. How

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far, on the one side, they may be accounted for as made by the suggestion of Mr. Douglass and Mr. Galloway, his counsel in England, to gain a certain end there; or how far, on the other, they may have been prompted by a hope of obtaining a return of his property here, you will judge for yourselves. After he obtained his pardon here and compensation in England, his heart appears to have been set on getting his attainder reversed and his property here restored; and the hope, it appears, never forsook him. Did it tend to keep the *animus revertendi* always alike in his breast? Does his reporting himself as an "alien" in England, and his styling himself "The Right Honourable Matthias Aspden of *Philadelphia*," shew that he considered himself an American? Or were such designations resorted to, only for the purpose of evading a tax on his dividends in England?

In fine, without wishing to express any opinion on the merits of the question, I may remark, that the biography of the testator, exhibits him as a man who led an unhappy and discontented life. Love of money his ruling passion, without ties of family or friendship, he fled to England to save his personal property from confiscation, and thereby lost his real property here. Notwithstanding his political principles made him prefer his Engliah allegiance in the war of the revolution, and though he was extremely vexed by the treatment which he had received from our Legislature, he still retained a strong attachment for his native land. When in England he was absent from the associations and companions of his youth, and ever planning his return. When he returns he finds every thing changed. The

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friends of his youth have been removed by death: New men have grown up and are at the head of affairs. Every thing has been moving forward, while he alone has stood still. He fails to meet the respect and attention to which he fancies that his wealth entitles him. He becomes sour and discontented, and returns to England to inflict on Chancellors and Parliaments the endless memorials which he had lately found ineffectual on Legislatures and Congresses. Time, instead of assuaging the sense of his grievances, seems only to add to their weight and number: his hopes of remuneration from republican honour or royal generosity, become at last a monomania: he spends his time in writing memoirs and memorials contradictory and unintelligible, to annoy his contemporaries and puzzle posterity, and indites a will in a few lines, whose meaning, after twenty years of litigation yet remains to be settled. A wandering hypochondriack in search of health, he spends his time in vibrating between two continents, is occupied throughout his life in accumulating wealth for unknown heirs, and finally dies without a friend to soothe his pillow or follow him to the grave! Whether he died an Englishman or an American, it is for you, gentlemen, to decide.

October 24th.

The jury having been out for twenty-four hours, found a verdict in favour of the American domicil at each of the dates mentioned in the issues. A few days afterwards a motion was made by the plaintiff for a

October 27th.

new trial, which was refused by the court, who ex-

October 30th.

pressed their satisfaction with the finding of the jury.

[APRIL SESSIONS, 1848, NO. 25, COMMON LAW DOCKET.]

PARKER VS. HOTCHKISS.

[PRACTICE: PRIVILEGE OF SUITORS.]

A suitor in this Court, *residing without the circuit*, is privileged from the service of a summons. The case of *Blight's Executor vs. Fisher & Ashley*, decided by Judge Washington, A. D. 1809, in which this privilege was limited to exemption from *arrest*, is here overruled.

Hotchkiss, the defendant, *who resided without this circuit*, had been admitted by the Court to make defence in a suit between Parker, the present plaintiff, and one Perkins: and he was attending in this city for the purpose of being present at the trial of that case. It was tried at this term, and Parker having been nonsuited, issued a *summons* on the same day, and served it on Hotchkiss *at his lodgings*. Mr. HAZLEHURST having applied to Judge KANE, who was sitting for the Circuit Court, to have the service set aside as for a violation of privilege, Mr. TITUS, for the plaintiff, contended that according to the well settled practice of this circuit, the service was perfectly regular. The practice was established by Judge Washington in a solemn decision,* made more than forty years ago, and which has been acquiesced in and acted upon by the whole profession since. In that case the position now taken by Mr. Hazlehurst was supported by Mr. William Griffith, one of the most acute and learned lawyers of New Jersey, and by Mr. Rawle, of this bar. Their citations were numerous, and no doubt their argument good. Judge Washington took time to examine the

OCT. SESSIONS, 1848.

STATEMENT.

* Blight's Execu'r v. Fisher & Ashley, Peters' Circuit Court Reports, 41: decided A. D. 1809.

In favour of the privilege.

January 16th.

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Statement.

books and to consider their arguments. We have a full and written opinion from him on the subject. He decided *against* the privilege. The very point, therefore, now before this Court has been once solemnly adjudged by it. A practice of forty years—embracing two generations of the bar—has never questioned its correctness. Surely this is an answer to all argument and to all learning. If precedents be worth any thing, and we are not forever to be laying foundations, some things must be regarded as settled.

Both the English law and the law of Pennsylvania were the same then as they are now. They were both known to Judge Washington, both were considered by him, and their value not extenuated. *He refused to adopt the State practice.* He thought that the State Courts had carried privilege too far. He doubted whether their notion that a member of the Assembly had a right to have a continuance of his cause as a matter of privilege—a declaration made by them*—was right: and this Court has just decided that his doubts were well founded.†

*Geyers Lessee v. Irwin, 4 Dallas, 107.
† Nones v. Edsall, *ante*. p. 189.

But if we are now to examine the matter anew, how does it stand? There has been no contempt of Court; nothing which has interfered with its functions in any manner or to any degree; no terrour has been inflicted; no withdrawal of any body from its business. The privilege claimed is in derogation of a clear common law right, and should rest on the clearest necessity. *Cole vs. Hawkins*‡ was a "motion against the attorney for a contempt," and the writ was served whilst "Lee, C. J. was hearing

‡ 2 Strange 1094; much better reported in Andrews, 275.

causes, and the defendant was on the steps leading to the Court attending his cause, which was just going to be called on." And though the Court was of opinion that the service of process in the sight of the Court is a great contempt and punishable by attachment, yet Chief Justice Lee says, "*it is another consideration whether such execution of a writ be void so that the party shall be discharged.*" Indeed it cannot be pretended that the English Courts would set aside such a service as this. In *Miles vs. M'Cullough*,* in our own State, the reporter's words are, "the defendant was attending *in* this Court;" and no doubt the process was served in the presence of the Court, either constructive or actual. *Hayes vs. Shields*,† which settles the State practice adversely to the present practice of this Court, (and which I admit is in point,) calls to its aid the privilege which in Pennsylvania is extended to *political* functionaries; a privilege which, as declared in that State to exist, this Court has denied to be rightly allowed.

Oct. Sessions, 1848.

Statement.

* 1 Binney, 77.

† 2 Yeates, 222.

Curia advisari vult.

Kane J. It is said that the practice of this Court, since the decision in *Blight vs. Fisher*, in 1809,‡ has been uniform, to discharge in such cases as this, from arrest under *capias*, but not to set aside the service of a summons. I confess that I have never apprehended the reason of this distinction, and when it was pressed upon me by the counsel for the plaintiff, I did not disguise my reluctance to accede to it. My instinctive respect for all the opinions expressed by Judge Washington, alone made me hesitate.

The Court's Opinion. January 19th.

‡ Peters' Circuit Court Reports, 41

Oct. Sessions, 1848.

The Court's Opinion. January 19th]

The privilege which is asserted here is the privilege of the court, rather than of the defendant. It is founded in the necessities of the judicial administration, which would be often embarrassed, and sometimes interrupted, if the suitor might be vexed with process while attending upon the court for the protection of his rights, or the witness while attending to testify. Witnesses would be chary of coming within our jurisdiction, and would be exposed to dangerous influences, if they might be punished with a lawsuit for displeasing parties by their testimony; and even parties in interest, whether on the record or not, might be deterred from the rightfully fearless assertion of a claim or the rightfully fearless assertion of a defence, if they were liable to be visited on the instant with writs from the defeated party.

As the privilege of the court, this incidental immunity to the party can scarcely be the subject of abuse. It can be exercised or not in each particular case, as the purposes of substantial justice may seem to require. (Per M'Kean, C. J. in *Starret's case**) The suitor or the witness from another jurisdiction may be relieved: he who is at home here amongst us, suffering no inconvenience from the service, may be refused his discharge.

*1st Dallas, 357.

Such have been my views heretofore, derived no doubt in some degree from the long established practice of our State courts, but certainly strengthened by what I have observed since I came upon the bench.

The case of *Hayes* v. *Shields** in the Supreme Court of Pennsylvania, was decided by Yeates and

*2d Yeates, 223.

Oct. Sessions, 1848.

The Court's Opinion. January 19th.

Smith, Justices, in 1797. A summons was served upon a non-resident defendant, one day after the trial of a cause in which he had been attending as a witness; and the court, after asserting that his exemption from process was the privilege of the court, and that the distinction taken by the plaintiff's counsel between writs of capias and summons, was not solid, "discharged the defendant from the suit."

The case of *Miles* v. *M'Cullough*,* was also a case of summons, served upon a party in attendance on the court. There, as here, the motion was made to set aside the service, and was resisted on the ground that the privilege claimed for the party was limited to cases of arrest. But the court said: "It has been repeatedly ruled, that he is equally privileged from the service of a summons;" and they set aside the service. I cannot regard this decision as resting on the circumstance of the defendant having been actually in presence of the court at the time when he was summoned. That circumstance was not adverted to in the argument—the question was one of privilege regarding the suitor, *not of contempt*—and the language of the court places the case of a summons on precisely the same ground as that of an arrest on the *score of privilege.*

* 1 Binney, 77

I am informed, that the practice of the courts of Pennsylvania, has been always in accordance with these decisions, and that since our present term began, a gentleman of the bar, who had come from a neighbouring county as counsel in a case pending before us, was protected by an eminent State judge, (Judge Sharswood,) from the service of a summons out of his court.

Oct. Sessions, 1848.

The Court's Opinion. January 19th.

It is also the practice of the State courts of New Jersey, the other State of this circuit. The opinion of Judge Southard in *Halsey* v. *Stewart*,* establishes this, and is besides an exceedingly clear exposition of the argument in its support.

* 1st Southard, 366.

With these views of the policy of the law, confirmed by the practice of the State courts throughout this circuit, and under a strong impression that the case of Mr. Hotchkiss illustrated aptly their propriety and justice, I felt myself at liberty to solicit the counsel of my brother Grier† upon the points presented by the defendant's application; and he has authorized me to say, that he concurs with me in the opinion that the service of this writ of summons ought to be set aside. He adds in his letter to me, that Chief Justice Taney has been good enough also to consider of the question, and has arrived at the same conclusion.

SERVICE SET ASIDE.

[APRIL SESSIONS, 1849, NO. 2, COMMON LAW DOCKET.]

† Judge Grier was at this time at Washington, attending the Session of the Supreme Court of the United States.

RUNDLE VS. THE DELAWARE AND RARITAN CANAL.*

[JURISDICTION, LOCAL ACTIONS, PUBLICK CORPORATIONS, RIGHTS OF PENNSYLVANIA AND NEW JERSEY IN THE DELAWARE. LICENSE AS DISTINGUISHED FROM GRANT.]

A Pennsylvania Plaintiff may sustain an action in this Court in *New Jersey* against a corporation chartered by the latter State, for consequential injuries done to the plaintiff's *real property lying in Pennsylvania*, the cause of the injury—a canal—being in *New Jersey*.

A corporation is private, as distinguished from publick, unless the whole interest belongs to the government, or the corporation is created for the administration of political or municipal power.

The proviso in the Pennsylvania and New Jersey Act of 1771, § 7, by which those States, in declaring the Delaware river a common highway, and authorising the improvement of it by commissioners, provided that no power given by the Act should give power "to remove, throw down, lower or impair, or in any manner to alter" certain mill dams, nor to obstruct or "in any manner hinder" the owners of them, or "their *heirs and assigns*, ... from taking water out of the said river for the use of the said mills," is not a *grant* of the water, but the toleration of a nuisance, and a mere *license*, revocable at pleasure, to use the water.

In the year of 1771, the Provinces of Pennsylvania and New Jersey respectively passed an act† declaring the river Delaware which separates them to be "a common highway, for the purposes of navigation," and appointing commissioners with full power and authority to remove all obstructions in the channel, whether natural or artificial. One section of the law enacts that no person shall presume to divert, lead or draw, by any race or other device, any of the water of the river from its natural course

April Sessions, 1849.

Statement.

† Act of 1771, Pennsyl'a, Mar. 9th, 1 Smith's Laws, 322. New Jersey, Dec. 21, Allinson's Laws, 347.

* For the report of the following case the author is indebted to the excellent brief and notes of A. I. Fish, Esquire, of the Philadelphia Bar, one of the learned counsel who assisted in the case at Trenton.

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for the use of any mill or water work. Another section authorises an *Indictment for maintaining any dam*, with a proviso, however, in the act, that nothing in it should give power or authority to the commissioners to remove, throw down, lower, *impair, or in any manner to alter* a mill-dam erected by Adam Hoops, in the said river; or any mill-dam erected by any other person or persons in the said river, before the passing of this act, "nor to obstruct, or *in any manner to hinder* the said Adam Hoops, or such other person or persons, *his or their heirs and assigns*, from maintaining, raising, or repairing the said dams respectively, or from taking water out of the said river for the use of the said mills and water works. The mill and water works of Mr. Hoops were on the Pennsylvania shore, just opposite Trenton, and were fixed there before the passage by either State of the act of 1771.*

Statement.

In the years 1830 and 1831, the State of New Jersey incorporated the defendants, giving them power to make a canal from the waters of the Delaware to the waters of the Raritan (that is across the State of New Jersey,) and "*to supply the said canal with water from the river Delaware* by constructing a feeder, which shall be so constructed as to form a navigable canal not less than thirty feet wide and four feet deep, *and to conduct the water from any part of the river Delaware.*"

Pamphlet Laws of New Jersey, 1829–30, p. 76.

*At Trenton the stream of the river meets the tide, and there is a fall of over nine feet when the tide is out, and over five feet at high water. A small island lies near the Pennsylvania shore, extending from tide water toward the head of the falls. Mr. Hoops owned the land on the western margin of the river, and erected a dam between this island and the shore, in the margin of the tide water. The island thus served as a wing dam, and gave him the benefit of the fall of the river for the mills which he had erected on his land.

The corporation, besides the usual powers of corporations, and particularly of those relating to corporations for internal improvements, had generally such power as was "necessary to perfect an expeditious and complete line of communication from Philadelphia, and to carry the objects of this act into effect." The capital stock was fixed at one million of dollars, with right of increase to a million and a half; divided into shares of a hundred dollars each; three-fourths of which were opened to be subscribed for by the publick generally; *the State of New Jersey reserving a right to subscribe for one-fourth, or any less sum.* There were nine directors, of whom *the State was to appoint two,* if she subscribed for a fourth part of the stock, or one, if for a less sum. *The State has the right of taking possession of the canal,* if the company abandoned or failed to keep it in repair for three successive years: and also at the end of thirty years to take possession of it on paying its worth at an appraisement to be provided for. The company did accordingly make a canal, diverting the water from the river Delaware about twenty miles above Mr. Hoops' mill dam, that is to say, about twenty miles above Trenton, the place to which the tides in the Delaware are able to rise. The plaintiffs who had succeeded to Mr. Hoops' right, now brought this action on the case, *in the New Jersey district,* for injury to *their mills in Pennsylvania,* by the consequent diversion of the water.

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Statement.

On demurrers these three points arose.

I. Whether the action was properly brought in the *New Jersey district;* or whether, as the real estate, the subject of the injury was in *Pennsylvania,*

1st point. Jurisdiction.

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and the injury was experienced there, the suit ought not to have been brought in the Pennsylvania district.

2d point. Character of Corporation.

II. Whether, admitting the jurisdiction, the defendants were not a publick corporation, as distinguished from a private one;—and so, the agents and officers of the State of New Jersey discharging a duty imposed upon them by publick law, and thus not liable to action from Individuals in the Courts.

STATEMENT.

3d point. Right to divert the waters of the Delaware.

III. Whether, admitting both the jurisdiction of the Court and the general liability of the defendants for injuries done by their canal, the act of 1771 gave Mr. Hoops and his assignees any such grant of the water of the Delaware as enabled him or them to recover damages for *a diversion of it injurious to his property*, it not being admitted by the defendants that the *navigation* of the river was injured by the diversion.

To understand this last point fully it is necessary to make a short historical statement concerning the river and the appropriation of its water.*

* The following statements and public proceedings illustrative of the whole river history from 1761 to 1848, were collected and cited by J. M. READ, Esq. and are here arranged and preserved for reference by the profession in future cases.

1761, 1 Smith's Laws 235; 1768, Id. 280; 1771, Id. 324; 1773, Id. 406; 1774, Id. 416; 1776, Id. 363, 1781, Id. 515; 1782, 2d Id. 43; 1784 Id. 90; 1785, Id. 311; 1791, 3d Id. 24; 1793, Id. 93; 1801, Id. 462; 1803, 4th Id. 20; 1804, Id. 118, 1809, 5th Id. 5; 1814-15, Penn. H. Journ. 537-557; 1815, Pamph. Laws. N. J. 1. 0; 1816-17, Penn. H Journ 537-557; 1817, 6 Smith's Laws, 422-503; 1817-18, Penn. H. Journ. 131; 1819, Pamph. L. Penn. 261; 1820, Pamph. L. N. J.; 1821, 7 Smith's L. P. 393; 1824, 2 Harr. Comp. N. J. 71; 1825, Pamph. L. Penn. 144; 1826, 9 Smith's L. P. 103; 1827, 9 Id. 332; 1827-8, Penn. H. Journ. 101; 1828, 10 Smith's L. P. 112-175; 1828-9, Penn. H. Journ.; 1829, 2 Harr. Comp N. J. 246; 1829, N. J. Ass. Min. p. 126-141. 1829, 10 Smith's L. P. 408; 1829-30, Penna. H. Jour. 198-204-209-225-293; 1830, Pamph. L. P. 129-218; 1831, Id. 216; 1831-2, Penn. H. J. vol. 2, p. 117-123-227; 1832, Pamph. L. P. 638; 1832-3, Penn. H. J. 184; 1833-4, Id.

It has been generally understood by the Profession that the River Delaware and its islands were not included in the Royal proprietary charter of either Pennsylvania or New Jersey, but that the property in them remained in the Crown, till by the Revolution of 1776 they passed equally to New Jersey and Pennsylvania. After this event, that is to say, in 1783, the two States, entered into an agreement by which, among other things, it was declared that the river from the north-west corner of New Jersey, southwardly, to the circular boundary of the State of Delaware, "in the whole length and breadth thereof, is and shall continue to be and remain a common highway, equally free and open for the use, benefit and advantage of the said contracting parties." It was also declared by this agreement that each State should "enjoy and exercise a concurrent jurisdiction within and upon the water" of the said river.

Under these notions and enactments, both States it appeared, and Pennsylvania in a particular degree, had used the waters of the river by common agreement until 1815 without dispute. On the 4th Feb. in the last named year New Jersey passed an Act authorizing Coxe and others to erect a wing-dam in the river, and divert the water for the purpose of turning mills and other machinery. This seemed to be the first exercise of an authority over the river by one State without the assent and ratification of

App. 209; 1834, N. J. Ass. Min. p. 19; 1834-5, Penn. Sen. J. vol. 2, p. 50-51-2, 74, 105-6, 663-4; 1835, N. J. Ass. Min. p. 228; 1839, Pamph. L. P. 371; 1841, Id. 344-437; 1842, Penn. H. J. Vol. 3, p. 49; 1843, Pamph. L. P. 237-241; 1844, Id. 554; 1845, Id 502; 1846, Ex. Doc. Pa.; 1846, Penn. Sen. J. Vol. 2, p. 25-6; 1846, Pamph. L. P. 408; 1847, Id. 355; 1847, Ex. Doc.; 1848, Pamph. L. P. 46.

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the other. It called forth a protest from the Legislature of Pennsylvania, on the 21st of February, 1815; followed by a second remonstrance in 1816, and a proposition to submit the matter to the Supreme Court of the United States, which was refused by New Jersey. After numerous messages and remonstrances between the Governors and Legislatures, commissioners were mutually appointed to compromise the dispute; but they failed to bring the matter to any conclusion. The dispute was never settled, and the wing-dam remained in the river.

History of the Delaware.

STATEMENT.

In 1824, the State of New Jersey passed the first act for the incorporation of the Delaware and Raritan Canal Company, for which the company gave a bonus to the State of $100,000. This act requires the consent of the State of Pennsylvania; and on application being made to her Legislature, she clogged her consent with so many conditions, that New Jersey refused to accept her terms, returning the bonus to the company; and so the matter ended for that time.

Both parties then appointed commissioners to effect, if possible, some compact or arrangement, by which each State should be authorized to divert so much of the water, as should be necessary for their contemplated canals. After protracted negotiations, these commissioners finally* agreed upon terms, but the compact proposed by them was never ratified by either party.

*In 1834

In the meantime each State appropriated to itself as much of the waters of the river as suited their purpose. In 1827 and 1828, Pennsylvania diverted

the stream of the Lehigh, a confluent of the Delaware, and afterwards finding that stream insufficient, took additional feeders for her canal out of the main stream of the Delaware. On the 4th of February, 1830, the Legislature of New Jersey passed the act under which the defendants were incorporated, and in pursuance of which they have constructed the dam and feeder, the subject of the present suit. April Sessions, 1849. History of the Delaware.

It did not appear that after this date, either State had strongly interfered to prevent the use of the water by the other: though the abstract right to do so had never been relinquished by Pennsylvania. The tide not flowing above Trenton, and ordinary boats not being able, in consequence of a fall in the river there to go above that place, the upper part of the river had become of comparative unimportance as a common highway; being important chiefly for bringing lumber *down* in the spring of the year, when the rains always make the river full, in spite of all artificial diversions which it would be possible to make. While on the other hand, the canals in both States supplied from the river, are intimately and extensively connected with their trade, revenues, and general prosperity. Statement.

Mr. Vroom and Mr. Ashmead for the plaintiff. For the Plaintiff.

I. *As to the jurisdiction:* It is conceded that the river is a common boundary, and of common jurisdiction; that the water drawn off is drawn off from Pennsylvania, and that the canal which draws it *lies in New Jersey*. If this were an ejectment for the mill, or any other action *in rem*, the suit would have to be brought in Pennsylvania. But it is not 1st point, Jurisdiction.

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so. It is a suit for *damages* caused by digging a canal; and that canal lies in *New Jersey*. Even admitting that the action were local, yet, says Lord Coke, "where the action is founded on two things done in several counties and both are material and traversable, and the one, without the other, does not maintain the action, the plaintiff may bring his action in which of the counties he will.*

2d point, Character of Corporation.

II. *As to the character of the Corporation.* The Delaware and Raritan Canal Company is not the State of New Jersey, nor the agent of the State. It is a mere collection of individuals erected into a corporation for the more easy transaction of their business. These individuals, at their own suggestion, and for their own benefit, have obtained a capacity of perpetual existence with other incidents of corporate character, and that is all.† The State has imposed no duty upon them. They are not acting for the State, nor by any order of the State. They are therefore not protected as public agents. The case of *Ten Eyck vs. the Delaware and Raritan Canal Company*, in the Supreme Court of New Jersey, is upon the same charter, and decides the exact point.‡

For the plaintiff.

† Dartmouth College v. Woodward. 4 Wheaton, 518; Bonaparte v. The Railroad Comp'y, 1 Baldwin, 223.

* Sylabus to Bulwer's Case, 7 Rep. 2; and see the Mayor v. Cole, 7 Term, 583, and Oliphant & Smith, 3 Pennsylvania 181. Cases bearing incidentally upon the subject so far as to prove the right to make an election in many cases sounding in damages, between the place where the injury was sustained and the place where the person is,—are: Gawen v. Hussee, 1 Dyer 38; Shaftsbury v. Graham, 1 Ventris, 364; Thursby v. Plant, 1 Saunders, 237; Russell v. Succlen, 1 Siderfin, 218; Gregson v. Heather, Fortescue, 366; Bellasis v. Burbritche, 1 Lord Raymond, 171; Scott v. Brest, 2 Term 240: Rex v. Burdett, 4 Barnewall & Alderson, 95: And American Cases, Foster v. Baldwen; 2 Massachusetts 569; Marshall v. Hosmer, 3 id. 23; Smith v. M'Iver 9 Wheaton, 532.

‡ 3 Harrison, 202; and see Governor v. Meredith, 4 Term, 794; Boulton v. Crowther, 2 Barnewall & Creswell, 703; Hall v. Smith, 2 Bingham, 156; Sutton vs. Clarke 6 Taunton, 29.

III. *As to the right of the defendants to take the water:* Mr. Hoops, by the proviso to the act of 1771, had a grant from both States prior to the act of partition between them in 1783. The former act, while giving power to the Commissioners to improve the channel, provides that nothing in the act should give *any* power or authority" .... "*in any manner to alter*" this dam .... "nor to obstruct *or in any manner to hinder*" Mr. Hoops, his "heirs or assigns," from maintaining, raising or repairing the said dam, or from taking water out of the said river for the use of said mill and water works."

3d point, Effect of Acts of 1771.

The construction of this is, that it was a right to place in the river a dam to be raised, repaired and *maintained.* It is not a mere license; nor temporary and personal. The subject to be protected was permanent, requiring great outlays to profit by the privileges of the proviso. The object was permanent. "Heirs and assigns" are words of permanency. It is not necessary, in construing an act of legislation that there should be *technical* words of grant. Both States, by the act of 1771, surrendered their right to Hoops. That is enough. When acted upon, the right became an executed grant, and was the property of Hoops forever. As a "contract," it could not be "impaired."*

For the plaintiff.

Even if the proviso in the act of 1771 were a license only, yet having been acted upon and been the subject of great outlays, it is irrevocable.†

If the proviso were not itself a grant, yet in favour of so ancient and uninterrupted a possession and so long an enjoyment it will be held to be evidence of

*Fletcher v. Peck 6th Cranch 87, 135; New Jersey v. Wilson, 7 id. 164; Green v. Biddle, 8 Wheaton, 1, 92; The People v. Platt, 17 Johnson, 195; the last a case protecting the grant of a river.

†Winter v. Brockwell, 8 East, 308.

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a grant, or of a right as good as grant. We claim by prescription for between seventy and eighty years. Twenty years are enough for presumption of a grant.*

3d point, Effect of Acts of 1771.

* Bealey v. Shaw, 6 East 208; Balston v Bensteed, 1 Campbell. 463; Tyler v. Wilkinson, 4 Mason, 402; Height v. Morris Canal, 4 Washington 607; cases, all of them, relating to the enjoyment of waters.

But even if the act of 1771 had never been passed we deny the right of New Jersey, or its creatures or agents, to drain the Delaware of its waters. In the river there is a community of rights, interests and privileges. The waters are indivisible. Both States hold them, all and every part of them, "*per my and per tout*," in trust as a publick highway for the benefit of the citizens of the Union. Neither State has a right to impair the navigation in any degree. The withdrawal of water to any appreciable amount impairs the navigation, and the amount here is clearly appreciable, for it has confessedly injured the plaintiff's mills. The navigation may not be practically injured *now*. Boats which now navigate might still navigate in a stream of half the size. But how will it be with larger boats, which future times may require? The river in future times will probably be navigated by the very largest boats that can navigate it at all. The least appreciable diminution of water may then be important. The *right* to lower the stream the hundredth part of an inch carries a right to divert or drain the river dry. There is but one rule on the subject, that is not to impair it at all.

New Jersey no right to withdraw water.

For the plaintiff.

For the defendant. 1st point, Jurisdiction.

Mr. J. M. Read, Mr. Green and Mr. A. I. Fish for the defendant. In an action on the case for injuries to real property, the party must seek his remedy where the injury is committed, and must lay

his venue there. The distinction between local and transitory actions,—that is to say between such actions as operate *in rem* and such as sound in damages, merely,—is thoroughly settled, and cannot be shaken.* That *this* is a local action, and as such subject to the laws which regulate that class of actions, is settled in *Watts vs. Kinney*,† in New York. C. J. NELSON, in the case says: "It appears to be conclusively settled that an action on the case for diverting *a water course*, so far savours of the realty as to be classed with local actions, and must be tried in the county where the injury happens."

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*Livingston v. Jefferson, 1 Brockenbrough, 203.

†23 Wendell, 484; S. C. on appeal, 6 Hill, 82.

For the Defendant

The corporation is a publick one. Its purposes are publick. The State owns a large proportion of its stock and may before long become the proprietor of it all. The case of *Ten Eyck vs. the Delaware and Raritan Canal Company*‡ in the Supreme Court of New Jersey, relied on by the other side, has not the highest authority. *Vanderveer vs. the Same Defendants*,§ involved the same questions, and on an appeal from the decision of the Supreme Court which made a similar decision, the Court of Appeals was equally divided;—standing nine to nine. In a leading case in Pennsylvania,‖ the State had incorporated a canal company in no respect more publick in its character than this one.¶ It destroyed the plaintiff's mill-dam. The Court held that however morally bound, there was no legal obligation to pay. "If the State," says C. J. GIBSON, "would not be bound to pay, how is the defendant bound. The Company acted by her *authority*."

2d point. Character of Corporation.

‡3 Harrison, 200.

§ Ms. Min. of The Court of Appeals. 1842.

‖ Monongahela Nav. Co. v. Coons, 6 Watts & Sergeant, 101, 114.

¶ See the Act of Pennsylvania Legislature, March 31, 1836, Pamphlet Laws, 282.

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Yet the act of incorporation imposed no *obligation* to destroy the dam; nor was the Company the agent of the State, any more than the defendants.

3d point. Effect of Act of 1771.

Unless Mr. Hoops has some such grant of the water as amounts to contract within the meaning of the Constitution, he cannot sustain this suit any where. Now, on general principles, both of the common and the civil law, running water is common to all.* The doctrine is recognized in the Supreme Court of New Jersey,† where it is said that by the law of nature navigable streams are common to every body, subject only to laws regulating their use, *and that they cannot be aliened.* The validity of even an express grant of the specific water might be questioned. But Mr. Hoops had no grant of any thing. The case is this: The act of 1771 declares the river a highway, and makes maintaining of any dam there an *indictable offence.* The proviso is but the exception of Mr. Hoops' dam from the general liability. If the proviso had not been inserted the commissioners would have been bound to destroy the dam and indict Mr. Hoops for obstructing the highway which it was the object of the act to clear. The proviso then is but a license It is moreover in derogation of general and paramount right in the community, and therefore must be construed strictly. But the value of this so called "grant" is not open to controversy here at all. Its precise value is settled in Pennsylvania; the Supreme Court of which State has declared that a license given by publick law to a riparian owner to erect a dam in a large navigable river and conduct the water upon his land for his own private purposes, is subject to any future

* Mason v. Hill 5, Barnewall & Adolphus 1, and see Mayor v. Commissioners, 7 Penn'a State, at 355.

† Arnold v. Mundy, 1 Halsted, 1, 61, 71 & 76.

For the Defendant

provision which the State may make with regard to the navigation of the river;* and "if the State authorize a company to construct a canal which impairs the right of such riparian owner he is not entitled to recover damages from the company." Now certainly the two States which tolerated the dam by the Act of 1771 have made a new provision by the Act of 1783, which parted the whole river between the two States. That act did in effect revoke the former license to Mr. Hoops.

*Susquehanna Canal Company v. Wright, 9 Watts & Sergeant, 9; Monongahela Navigation Co. v. Coons, id. 101.

The title by prescription which is relied on is equally unsound with that of express grant. Like adverse possession, prescription does not prevail against sovereign powers who cannot apply the same vigilance which is reasonably required of private proprietors."†

For the Defendant

†Pea Patch Island Case, Wallace Jr., Appendix, *post.* cliii.

It is no part of this case that the navigation is impaired by the use which the defendants make of the river. They therefore trench upon no publick rights; and their private rights to use the water are just as good as those of any riparian owner. They may dip in the margin of the river, or draw the water in pipes or drains. So long as they do not impair the navigation of the river they are within the bounds of right.

The Delaware river being the joint property of both States, Mr. Hoops and his assigns own no part of it either above or below where the tide flows.‡ Navigable water in Pennsylvania does not mean tide water merely. Every part of the Delaware river—above Trenton as well as below it—belongs to the commonwealth, not to the riparian owner. The

‡Id. cxxii.

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rule of the civil law, not of the common law, prevails in that State.* If the water has been diverted to the injury of her citizens, the State of Pennsylvania alone would have a right to complain. But that State is estopped by her own acts. She has diverted entire confluent streams from the waters of the Delaware. She has taken directly from the main stream large supplies of water for her canals and publick improvements, without asking or obtaining the sanction of New Jersey.†

*Carson v. Blazer, 2 Binney, 475.

† See *ante*. p. 281.

The Court's Opinion.

GRIER, J. The first question in the order in which they have been argued with much learning and ability, is that affecting the jurisdiction of this court over the subject matter of the suit.

On the first point. The jurisdiction of the court.

Originally all actions were tried in the proper county in which they arose, pursuant to the maxim *vicini vicinorum facta presumuntur scire*. Now all personal actions, as debt, detinue, assault, deceit, trover, &c. may be brought in any county. But actions real and mixed, as trespasses *quare clausum fregit*, ejectment, waste, &c. must be laid in the counties where the land lies, and if not so laid, it is cause of demurrer.‡ This distinction between actions local and transitory, is still maintained§ even at the expense of a failure of justice. The present is undoubtedly to be classed with local actions. But it often happens that indictments for criminal offences, and actions on the case for injuries to real property and other cases local in their nature, are founded upon things done in *two or more counties*, which are necessary to constitute the offence. Formerly where a nuisance was done in one county to

‡1 Bacon's Abridg. Tit. Actions local and transitory. Let. A.

§ Livingston v. Jefferson, 1 Brockenbrough, 203.

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lands lying in another, an *assisa in confinio comitatûs* lay at common law.* "And albeit," says, Lord Coke, "the counties do not adjoin, but there be twenty counties mean between them, yet the assize in confinio comitatus doth lie, and the justices shall sit between the said counties."† And if a declaration contained matters lying in two counties, it was tried by both counties on a venire directed to the sheriff of both counties, who summoned six of each county. But such proceedings have long been obsolete and the doctrine established in Bulwer's case,‡ has ever since been held as law both in England and this country: "That where the action is founded on two things done in several counties and both are material and traversable, and the one without the other doth not maintain the action, then the plaintiff may bring his action in which of the counties he will." Thus, if a man does not repair a well in Essex which he ought to repair, whereby my land in Middlesex is drowned, I may bring my action in *Essex, for there is the default* as it is adjudged, in 7 Hen. IV. 8, or I may bring it in *Middlesex, for there I have the damage*, as is proved by 11 R. I, *action sur the case*, 36."*

*F: N. B: 183–4.

†Co. Litt. 154, *a*.

‡7 Rep. 2. *a*.

*Gawen v. Husse, 1 Dyer 38, *a*. Scott v. Brest, 2 Term 241; Mayor v. Cole, 7 Term 583; Rex v. Burdett, 4 Barnewall & Alderson, 95; Oliphant v. Smith, 3 Penna. 180.

It has been objected to the application of this doctrine, to the present case, that it refers to *counties* which adjoin, and not to sovereign States. This is a distinction, it is true, between the cases cited and the present, but we have heard no reason given why it should make a difference. Actions may be maintained in the courts of New Jersey by a Pennsylvanian to recover a debt or damage for a personal injury: And why not for an injury to real property?

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The answer must be, because the action is local and not transitory. The difficulty is caused not by any principles of international law, but by the common law, which is the same in both States. By the common law then, it must be solved. The objection is founded not on the plaintiff's right to a remedy, but on the mode of trial; and is after all but an objection to the venire. But I have shown that the venire is well laid in New Jersey, (which as regards this court forms one county) because the nuisance complained of was created in that State. If then the action be local, and this its proper venue, what is the value of the distinction?

Jurisdiction sustained.

The plea to the jurisdiction must therefore be overruled.

On the 2d point. The character of the corporation.

Are the defendants then a publick corporation and therefore as publick officers who have acted within the scope of their authority and without malice or oppression, not liable for consequential injury? Where a party attempts to justify under a publick law, for a consequential injury inflicted on the property of another, he must show that he was a publick officer, in the performance of a duty imposed upon him by law; that he did not exceed his authority, but acted according to the best of his skill and judgment, doing that only which it was his duty to do.*

* Glass Plate &c. v. Meredith, 4 Term, 794; Sutton v. Clark, 6 Taunton, 29; Boulton v. Crowther, 2 Barn. & Cress. 703, Hall v. Smith, 2 Bing. 156.

In the popular meaning of the term nearly every corporation is publick, inasmuch as they are all created for the publick benefit. Yet if the whole interest does not belong to the government, or if the corporation is not created for the administration of political or municipal power, it is a private corpora-

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tion. Thus all bank, bridge, turnpike, rail road, and canal companies are private corporations. In these and other similar cases, the uses may in a certain sense be called publick, but the corporations are private, as much so as if the franchises were vested in a single person.* The State by virtue of its right of eminent domain, may take private property for publick purposes upon making compensation. It may delegate this power to a private corporation by reason of the benefit to accrue to the publick, from the use of the improvements to be constructed by the corporation. But such delegation of power to be used for private emolument as well as publick benefit, does not clothe the corporation with the inviolability or immunity of publick officers performing publick functions.

* Dartmouth College v. Woodward, 4 Wheaton, 669

In the case of *Ten Eyck* v. *The Delaware and Raritan Canal Company*,† the Supreme Court of New Jersey in their opinion delivered by Nevius, Justice, speaking of the corporation defendant in this case, very correctly say, "Whatever may have been the objects of this corporation, whether to erect a publick navigable highway, or to improve the navigation of the Raritan river, or whether the publick have the right to the use and enjoyment of these improvements when made or not, the company are essentially a private company, and *are not the agents of the State*. Their works are not constructed by the requirement of the State. The State could not compel the company to construct this canal. It has permitted them to do so at their own request. The whole scope of their charter indicates clearly, that the Legislature did not intend to interfere with pri-

† 3 Harrison, 204.

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vate and vested rights, without providing a recompense to be paid by the company and not by the State; and if the injury or damage has accrued to the private property or rights of others, which could not be foreseen or anticipated, and are therefore not provided for in the charter of the company; this constitutes no reason why the party thus injured should not be compensated."

As an exposition of the law of this State, this case is binding on this court; and we fully concur in the principles of law laid down by the judge who delivered the opinion of the court.*

*And see Sinnickson v. Johnsons, 2 Harrison, 150, Stevens v. Middlesex Canal, 12 Massachusetts, 466, and Crittenden v. Wilson, 5 Cowen, 165.

†6 Watts & Sergeant, 101.

The case of the *Monongahela Navigation Company* v. *Coons*,† in Pennsylvania, has been relied upon as establishing a contrary doctrine. It is true, that in that case, the Monongahela Navigation Company was a private corporation. They had power to make a slack water navigation in the *Monongahela River*, by the erection of dams and locks in the same; and the act of incorporation required them to make compensation for injuries done to private property on the Monongahela, but made no provision for compensation for like injuries on the Youghiogany its confluent, *because the company were not empowered to back the water or affect its natural flow in the Youghiogany*. But the company by the erection of a dam in the Monongahela below the mouth of the Youghiogany, destroyed a mill erected on that stream, under a license from the Commonwealth, and were held not liable to make compensation. But this case seems founded on doctrines peculiar to the courts of Pennsylvania; and although in the deter-

mination of points hereafter to be considered in this case, it will be quoted as binding authority; for the purposes of the question now under consideration, we must be governed by the law as established by the courts of New Jersey.

If therefore, the plaintiff's claim for damages in this case, had arisen from the *flooding of his land* either on the New Jersey or Pennsylvania side of the river, by the dam or wing wall erected by defendants for the purpose of feeding their canal; or for injury to a mill erected on a *private stream* by flowing back the waters of the river; the case would probably have ended here, and the plaintiff been entitled to judgment.

But the injury alleged does not arise from either of these causes. The plaintiff's mill is situated twenty miles below the head of the canal or feeder and the dam erected by defendants; and the injury complained of arises from the diversion of the water of the Delaware and its confluents; thereby diminishing the flow of water to the plaintiff's mill.

By the section of their charter quoted *ante.* p. 276, the defendants have the authority of the State of New-Jersey, for diverting the water of the river Delaware for the purpose of canal navigation.

In order then to ascertain the plaintiff's right to recover for any injury alleged to be consequential upon such diversion, we must enquire:

1. To whom do the channel and waters of the river Delaware belong?

2. What are the rights of the plaintiff as ripa-

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rian owner, in the said river, according to the laws of Pennsylvania?

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3. Have they any title to the waters of said river for the use of their mills, by grant from the States of Pennsylvania and New Jersey, or either of them?

4. Had the State of New Jersey a right to divert the waters of the Delaware for the purpose of canal navigation without the consent of Pennsylvania?

5. And whether or not, has the plaintiff a right to dispute their power or to raise that question in the present controversy?

The river Delaware is the boundary between the States of Pennsylvania and New Jersey. The tide ebbs and flows to the part of the Trenton Falls where the Trenton bridge crosses the river: above that point it is a fresh water stream. Previous to the revolution, the channel and waters of the river below Trenton, so far as the river was *navigable* in the common law sense of the term, were vested in the King of England. The grant both for New Jersey and for Pennsylvania was bounded by the river Delaware. So far as the tide ebbed and flowed, these proprietors had no title to the bottom of the river below low water mark. But above the bridge and the flow of the tide, the proprietors of each Province, held *ad filum medium aquæ*, by the established principles of the common law, according to which their respective grants must be construed. So far as the river was the property of the crown, it devolved on the two States by the revolution, and the treaty of peace with Great Britain. Immediately after the treaty of peace, the States of Pennsylvania

and New Jersey entered into the compact of April 1783, making the Delaware a common highway for the use of both States. APRIL SESSIONS, 1849.

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Without referring to the very numerous Acts of Assembly of the two States with regard to this river, which have been brought to our notice by the industry and research of the learned counsel, it will be necessary for the purposes of this case, to notice only a few of the more prominent points of its history from that time till the present. On the 3d point. Right to the Waters of the Delaware.

For thirty years after the compact the States appear to have enjoyed their common property without any dispute or collision. When the legislature of either State passed any Act affecting it, they requested and obtained the consent and concurrence of the other. The first dispute which arose on the subject was caused by an act of the Legislature of New Jersey, passed on the 4th of February, 1815. [His Honour here went into a short narrative of this part of the river history, in very nearly the same words in which it appears in the Statement of the reporter, who has adopted it in the preliminary part of the case. His Honour then continued:] Indeed it would seem as if the river had become of little comparative importance, as a common highway, being used only for descending navigation in the spring of the year, when the banks are full and the subtraction of the water for artificial navigation causes no sensible diminution, or materially affects the navigation of the stream. The practical benefits resulting to both parties from their great publick improvements have convinced them that further negotiations, complaints or remonstrances are use-

See *ante*, p 279-80-81.

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less and unreasonable; and thus by mutual acquiescence and tacit consent the necessity of a more formal compact has been superseded.

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On the 3d point. Right to the Waters of the Delaware.

After the brief summary presented by the reporter's statement, and in the remarks which I have just made of the transactions between the States concerning this river, their common boundary and property, let us now inquire whether the plaintiffs have shown any title to the channel of the river and the use of the waters flowing therein which will enable them to support an action against persons authorized by either of the States to divert the waters of the river for the use of their great publick improvements.

In 1771 Mr. Hoops, at that time owning the Pennsylvania shore, and having erected his dam there, in the manner already described,* the Legislatures of the provinces of New Jersey and Pennsylvania passed concurrent acts declaring the river Delaware a "*common highway for the purposes of navigation.*" By these acts commissioners were appointed and authorized to remove all obstructions in the channel, whether natural or artificial, with the *proviso*† whose effect has been one of the subjects of argument.

* *Ante*, p. 275–6.

† *Ante*, p. 276.

By the common law of England a river is defined as navigable so far only as the tide flows. The soil under a navigable river does not belong to the owners of the adjoining banks. But fresh water streams of what kind soever belong of common right to the owners of the adjacent soil.

The water may be under a servitude to the publick as a highway, but still the channel of the river

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to its central line belongs to the riparian owner who by reason of his title to the land over which it flows has an usufruct in the water as it passes, provided he does not obstruct the publick use as a highway. And if before it was declared a highway, he had erected mills or made other use of the stream as it flowed over his land, and his mills or other works are injured or impaired by such seizure to a publick use, he is entitled to remuneration as much as if houses or other land had been so taken. And if an individual or a corporation should divert the water flowing on his land to his injury, they could not plead this exercise of the eminent domain granted to them by the State as a justification for taking the private property of the citizen without compensation.

On the 2d point. Right to the Waters of the Delaware.

But the law of Pennsylvania by which the title and rights of the plaintiffs must be tested, differs materially from that of England and most of the other States of the Union. As regards her large fresh water rivers she has adopted the principles of the civil law in preference to that of England. In the case of *Carson v. Blazer*,* the Supreme Court of that State decided that the large rivers, such as the Susquehanna and Delaware, were never deemed subject to the doctrines of the common law of England applicable to fresh water streams, but that they are to be treated as "navigable" rivers: that the grants of William Penn, the proprietary, never extended beyond the margin of the river, which belonged to the publick, and that the riparian owners have therefore no exclusive rights to the soil or water of such rivers *ad filum medium aquæ*.

* 2 Binney, 475.

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In *Shrunk v. The Schuylkill Navigation Company*,* the same Court repeat the same doctrine; and Chief Justice Tilghman in delivering the opinion of the Court observes, "Care seems to have been taken from the beginning to preserve the waters of these rivers for publick uses both of fishery and navigation; and the wisdom of that policy is now more striking than ever from the great improvements in navigation, and others in contemplation, to effect which it is necessary to obstruct the flow of the water in some places and in others to divert its course. It is true that the State would have had a right to do these things for the publick benefit even if the rivers had been private properties; but then compensation must have been made to the owners, the amount of which might have been so enormous as to have frustrated or at least checked these noble undertakings."

* 14 Sergeant & Rawle, 71, 80.

On the 3d point. Right to the Waters of the Delaware.

In the case of *The Monongahela Navigation Company v. Coons*,† before referred to, Coons had erected his mill under a license given by an Act of the Legislature (in 1803), riparian owners to erect dams of a particular structure, "provided they did not impede the navigation," &c. The Monongahela Navigation Company, in pursuance of a charter granted them by the State, had erected a dam in the Monongahela which flowed back the water on the plaintiff's mill in the Youghiogany and greatly injured it. And it was adjudged by the Court, that the Company were not liable for the consequential injury thus inflicted. Chief Justice Gibson speaking of the rights of plaintiff consequent on the license granted by the Act (of 1803) observes:‡ "That statute gave riparian owners liberty to erect dams of a

† 6 Watts & Sergeant, 101.

‡ p. 112.

particular structure on navigable streams without being indictable for a nuisance, and their exercise of it was consequently to be attended with expense and labour. But was this liberty to be perpetual and forever tie up the power of the State? Or is not the contrary to be inferred from the nature of the license? So far was the legislature from seeming to abate one jot of the State's control, that it barely agreed not to prefer an indictment for a nuisance except on the report of viewers to the Quarter Sessions. But the repeal of a penalty is not a Charter, and the alleged grant was nothing more than a mitigation of the penal law. The statute is *pro tanto* a repealing one, which offers no express compact to any one. It was ruled in *The Charles River Bridge* v. *The Warren Bridge*,* that the State is not presumed to have surrendered a publick franchise, in the absence of proof of an unequivocal intention to do so. It would seem that the publick dominion may be parted with, but not without an explicit renunciation of it. And this relieves the case from the pressure of that clause of the Constitution, which declares that no State shall pass a law impairing the obligation of contracts."

On the 3d point. Right to the Waters of the Delaware.

* 11 Peters, 420.

The case of *The Susquehanna Canal Company* v. *Wright*,† confirms the preceding views and decides that the State is never presumed to have parted with one of its franchises in the absence of conclusive proof of such an intention. Hence a license accorded by a publick law to a riparian owner to erect a dam on the Susquehanna River and conduct the water upon his land for his own private purposes is subject to any future provision which the State may make with regard to the navigation of the river. And

† 9 Watts & Sergeant, 1.

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The Court's Opinion.

On the 3d point. Right to the Waters of the Delaware.

*p 13.

if the State authorize a Company to construct a canal which impairs the rights of such riparian owner, he is not entitled to recover damages from the Company. In that case Wright had erected valuable mills under a license granted to him by the legislature; but the Court say* "He was bound to know that the State had power to revoke its license whenever the paramount interests of the publick should require it. And in this respect a grant by a publick agent of limited powers, and bound not to throw away the interests confided to it, is different from a grant by an individual who is master of the subject. To revoke the latter after an expenditure in the prosecution of it would be a fraud. But he who accepts a license from the legislature, knowing that he is dealing with an agent bound by duty not to impair a publick right, does so at his risk; and a voluntary expenditure on the foot of it gives him no claim to compensation."

Without expressing any approbation of the doctrines established in the two last cited cases, we are nevertheless bound to say, that they settle authoritatively and conclusively the question now under consideration. They apply also with double force to the present case, as no valuable improvements have been made by the plaintiffs on the faith of a legislative license. It has been contended that the proviso in the joint acts of the Legislatures of Pennsylvania and New Jersey of 1771, already referred to, operated by way of grant to Adam Hoops, his heirs and assigns, of a right to divert the water of the river Delaware to his mills. But we can discover nothing in the nature of a grant in the words of this proviso. It amounts to no more than the

Grant as distinguished from License.

present toleration of a nuisance previously erected; and at most to a license revokable at pleasure. The doctrine of the cases which we have just quoted, applies to it with full force and conclusive effect.

Grant as distinguished from License.

Nor can the plaintiff claim by prescription against the publick for more than the act confers on him, which, at best, is but impunity for a nuisance.

On the 3d point. Right to the Waters of the Delaware.

We are of opinion also, that it is not competent for the plaintiff to question the authority of New Jersey to take the waters of the Delaware for her publick improvements without the consent of Pennsylvania. The channel and waters of this river are vested in the two States as tenants in common, as we have already seen; and no one can question the authority of either to divert its waters but the other. Pennsylvania was the first to seize on a portion of their joint property, for her separate use, and is estopped by her own act from complaint aganst New Jersey, who has but followed her example. Besides this, mutual consent may be presumed from mutual acquiescence. At all events the plaintiff, who is shown to have no title to the river or any part of it, and whose toleration or license could at best only protect him from a prosecution, is not in a situation to dispute the rights of either, or claim compensation for a diversion of its waters for the purpose of the publick improvements, of either of its sovereign owners.

It will be unnecessary to inquire whether the compact of 1783, operated as a revocation of the toleration or license granted by the act of 1771, to the dam of Adam Hoops; as that question can only arise in case of an indictment of it as a publick nuisance.

JUDGMENT FOR DEFENDANT.

NOTE.

The Reporter is sure that no apology is requisite for appending to this report, and as connected with one point in the case, the following opinion of the late RICHARD STOCKTON, Esquire, of New Jersey; one of the ablest lawyers and statesmen whom our country has produced, and whose lofty honour both in his professional and political career deserves to be held in even higher remembrance than his uncommon abilities.

The opinion is derived from the MS. collection of A. I. FISH, Esq. of the Philadelphia bar. Its value in connexion with the present case, is increased from the fact, that it was one of the opinions upon which the Company proceeded upon their enterprize, and that it was not known to the court when its judgment was given. As Mr. Stockton died in March, 1828, it was, of course among the last opinions which he ever gave.

OPINION.

On the right of New Jersey to make a canal without first obtaining the consent of Pennsylvania to use the waters of the Delaware. The following positions it is believed are undeniable:

1. The river Delaware was not included in the ancient grants of the King of England and the Duke of York, either to the proprietors of New Jersey, or to William Penn the proprietor of Pennsylvania, but the property therein and its islands, remained in the crown of England until the revolution. The rights of private property claimed by individuals, on either side of the river, had no other legal foundation but occupation or possession.

2. By the war of the revolution, and the treaty of peace, New Jersey and Pennsylvania acquired a property therein equally; namely each State to the channel or middle of the river on its own side. The agreements between the two States as to jurisdiction, and the partition of the islands, recognize this position, and are bottomed upon it.

3. The property of each State to the middle of the river is as absolute as the subject matter permits. To the shores and the ground covered with water to the channel, it is as perfect and unlimited, as to other parts of its territory. The agreements referred to amount to a *partition*. Each holds its own in severalty; fully and entirely independent of the other.

4. There is nothing since remaining in common but the *waters* of the river, which are incapable of division. But a right of property in the waters of a river can only exist for *appropriate* uses, namely for navigation and transit—therefore the rights of navigation and passage remain common to the citizens of both States, over the entire river, and would have so remained without an express stipulation.

Then may not either State appropriate the waters washing her own shores to publick improvements? And what is the just limitation of the right if it exists? These questions depend upon the received law of nations—the only rule of action between independent States, and upon a just application of its principles to the subject before us.

The most approved writers on the law of nations, consider the property in a river belonging to two States, as absolute in each, to its own half part—and content themselves, with laying down the limitations, to such absolute property, which rightfully arise out of the common claim to the waters of the river—and these limitations are made to depend upon that great principle of justice, adopted by all codes of law, *that each must so use his own right as not to destroy or materially injure the right of the other.*

Vattel* goes over these limitations. He says "it is not allowable to raise works on the bank of a river to turn its course, and turn it on the opposite bank. In general, no person ought to build on a river or elsewhere, any work *which is prejudicial to the right of another.* If a river belongs to a nation, *and another has the right of navigation,* the first cannot form a dam or mill *that shall stop its being navigable.* Its right in this case is only that of limited property, and it cannot exert it, but by respecting the rights of others† The right of navigation necessarily supposes that the river shall remain free and navigable, and therefore must exclude every work *that will entirely interrupt its navigation.*"‡

* Bk. 1 Ch. 22, § 271.

† id. § 272.

‡ id. § 273.

I am therefore of opinion that the State of New Jersey is under no legal necessity of asking the permission of the State of Pennsylvania to use the waters of the Delaware, for publick improvements, provided, that the *navigation* and the right of *passage* are not thereby injured or interrupted.

This opinion has not been hastily formed, but is the result of as full an investigation as I could bestow upon the subject. It is believed that Pennsylvania has substantially acted upon this principle. It is said that from the Trenton Falls upwards, the waters are in many places diverted from *their natural courses,* for the accommodation of mills, without the consent of New Jersey. The Bristol canal is to be supplied by tapping the Lehigh river, near to the place where it empties itself into the Delaware. Now the principle that the owner of a river, has a right to insist that the waters of a tributary stream, shall not be diverted from its natural course, until it reaches its destination, is as fully established, as that the course or waters of the main river, shall not be altered or diverted: and the injury to New Jersey is precisely the same in this case as if the water was taken from the Delaware itself.

RICHARD STOCKTON

29th January 1828.

CHILDS VS. LENIG.

[PRACTICE: AMENDMENT OF PLEADINGS.]

A defendant will not be allowed as a matter of course, to put in new pleas in this court as in State courts, *on the trial* of a case. The court speaks of the practice of so doing as vexatious: and one which will be allowed only where a good reason is shewn for it, and then, generally speaking, only upon terms.

April Sessions, 1849.

The patent act, as it is called, of July 4th 1836,* "permits," a defendant, in suits brought for infringment, to plead the general issue in a variety of cases which the act specifies, and to give any special matter in evidence of which he may have given thirty days notice to the plaintiff. And the judiciary act of September 24th 1789,† gives authority to the *court* to "*permit* either of the parties to amend any defect in the impleadings," upon such conditions as the court may prescribe.

* § 15; 5th Statutes at Large, 123.

Statement.

† §32; 1st Statutes at Large, 91.

April 12th.

This cause was now called on for trial; and the defendant having pleaded the general issue, and given the thirty days notice of his special matter, Mr. Cuyler and J. Fallon, asked leave to put in several *special pleas*, some of which, it was said, covered the same ground as the special matter, and others of which were new defences, which, however, might have been pleaded generally, with notice. They offered to the plaintiffs, if there was any surprise on them to continue the case till next term, but shewed no reason, except the omission of their client to inform them of all his defences, why the pleas had not been put in or notice given of their effect, thirty days before the trial.

APRIL SESSIONS, 1849.

Mr. TITUS and Mr. STEPHENS for the plaintiffs, objected to the new pleas being put in now. The pleas were a surprise; and a trial, not a continuance, was wanted by the plaintiff, who had brought many witnesses from a distance.

THE COURT'S OPINION. April 12th.

GRIER, J. This practice of putting in new pleas at the moment of trial, which we derive from the State courts, is a very vexatious one; and we are not disposed at all to encourage it here. The practice puts it in a defendant's power to put off the suit almost as often as it is brought to trial; for if the new pleas are artfully drawn, (as they may be on purpose) and suddenly sprung upon the counsel, he may naturally not wish to reply to them on the spot. Even in the State, while I presided in a judicial district there, though I could not, under the State law, *prevent* a party from putting in new pleas, I have generally done whatever I fairly could to discourage it beyond the strict requirements of the act. But in this court we are under no *obligation* to allow pleas to be thus put in. It is a privilege which the *court may permit* in its discretion. In the State courts it is different. "*The defendant*," says the State act,* may "alter his plea or defence *on* or before the trial.... and if by such alteration or amendment the adverse party is taken by surprise, the trial shall be postponed until the next court."

* Act of March 21st, 1806.

April 12th. Leave refused

The defendant must in this court, shew something which addresses itself to our conscience: and even then we should probably continue the cause only on terms; as for example the payment of costs of the term.

[APRIL SESSIONS 1846, NO. 3, COMMON LAW DOCKET.]

CARRIGAN VS. THE CHARLES PITMAN.

[PRACTICE: APPEALS FROM THE ADMIRALTY.]

When an Admiralty case comes into this court on an appeal from the District Court, either side—by the practice of the 3d Circuit—is at liberty to take new evidence. But generally speaking, where the decree of the District Court is reversed, because it was given on a different state of facts from that presented to this court, the party succeeding here does not have costs.

APRIL SESSIONS, 1849

STATEMENT.

The District Court had given a judgment in Admiralty against the schooner Charles Pitman, from which there was an appeal to this court. Mr. RAYBOLD for the libellant, now moved to take certain testimony on one of the points, upon which the District Judge had decided the case; a point, it appeared, which had not been much adverted to by counsel below. Mr. ST. G. T. CAMPBELL, on the other side, suggested that the course was irregular; this court taking cognizance of appeals strictly as an appellate court.* *J. B. & C. Dyott's*† case declares, that the duty of such a court is to correct the errour of an inferior tribunal, which being supposed to have examined the case thoroughly, cannot with propriety be said to have *erred*, when on the evidence given its decision was perfectly right. The court there remark: "We cannot examine the case *de novo*, without overwhelming the court with business; and in many cases, unless this be done, and the cause be reheard *in toto*, we run the risk of doing more injustice than we prevent, by determining a cause on an apparent state of facts, which the opposite party has had no opportunity to explain or rebut." The remark ap-

Against new evidence. April 14th 1849.

*§21, Act of Sept. 24th 1789,

†2 Watts & Sergeant, 564.

April Sessions, 1849.

plies to this court: and the practice will prove particularly hard in Admiralty cases, where a party finding that no case, or an insufficient one, has been made on the other side, dismissed his witnesses who go to sea, and cannot again be found. There ought at least to be shewn a special necessity, and a reason why the testimony was not taken below.

Statement.

The Court's Opinion. Justice Grier. April 14.

Grier, J. The practice at this bar having been for many years to proceed *de novo* in the testimony, I hardly feel at liberty now to change it; though I have rather grumbled in one or two cases; where parties finding out from the opinion of the District Judge where their case pinched, have taken new testimony here to help them out of their difficulty; and have thus presented so different a case to *me*, that I have reversed my brother Kane's decisions, when they were perfectly right—upon the facts presented to *him*. But under such circumstances I have allowed no costs to the party succeeding, and generally speaking, should think this rule to be but equitable.

Rule allowed.

[APRIL SESSIONS, 1849, NO 11, COMMON LAW DOCKET.]

BLANCHARD VS. BROWN

[PRACTICE: PEREMPTORY CHALLENGE.]

No Peremptory Challenges are allowed in this Court to either side where the jury has been already struck on both sides.

April Sessions, 1849.

Statement.

This cause coming on before a jury which had *been struck on both sides*, Mr. Hirst asked permission to make *two more peremptory challenges*, in the way allowed in the State Courts under the Act of their Legislature,* which provides "that in all civil suits each party shall be allowed to challenge *two jurors peremptorily*." He said that the State practice had been uniformly adhered to in this Court for twenty years; a statement in which Mr. Randall and other gentlemen of considerable experience, had confirmed him in a previous case,† where the right was a good deal insisted upon, as part of the settled practice of the Court.

* Act of April 4th, 1809, § 2.

† White v. Brown, *ante*. p. 217.

The Court's Opinion. April 16th.

Grier J. I have allowed these challenges to be made once or twice by consent of parties; but it is in violation of common sense and of the spirit of the decision of the Supreme Court of Pennsylvania which refused to extend the privilege in the case of special juries further than the letter of the act required.‡ Their language is thus, and we entirely agree with it: "The sense and spirit of the privilege is, that a party shall possess the power of challenging at least two persons who may be obnoxious to him, but against whom there is no legal exception as

‡ Schwenk v. Umsted, 6 Sergeant & Rawle, 351.

April Sessions. 1849.

The Court's Opinion. April 16th.

jurors. This is a proper indulgence even to prejudice; *but the reason ceases when he has an opportunity of striking off twelve.* If a practice had not prevailed to the contrary, I should much doubt this right in any case of special jury. Why should this indulgence and arbitrary discretion be extended to fourteen? Why should the suitor, after striking out at his pleasure, one full jury, have the right, on the trial, to strike out two jurors more without cause? He has, in the words of the *venire*, put himself on the jury *so* struck."

If the State practice has been adopted here it has been through inattention; and now that its incorrectness is pointed out, will not be allowed any more. I may further say that I believe that even in the State, the practice is confined to the South Eastern part of it. It does not, I know, prevail in the West.

CHALLENGES REFUSED.

(APRIL SESSIONS, 1846, NO. 21, COMMON LAW DOCKET.)

Memorandum.

May 9th, 1849. JOHN W. ASHMEAD, Esquire, by Commission from President Taylor, dated this day, succeeded THOMAS McKEAN PETTIT, Esquire, in the office of District Attorney.

TAYLOR VS. THE ROYAL SAXON.

The Admiralty jurisdiction of the courts of the United States extends to petitory suits as well as to those merely possessory; that is to say, it may pass upon the disputed title of ships as well as upon the simple right of possession to them.

A sale of a vessel by order of a court of Pennsylvania under the Foreign Attachment law of that State, does not divest a lien in the Admiralty for seamen's wages, which may accordingly be enforced in the latter court. (The libel in the Admiralty was here filed prior to the *order of sale* in the State court.)

The pendency of a replevin in a State court to settle the right of property in a vessel, is a bar to a libel in the Admiralty to settle the same right between the same persons; not technically a bar as a plea of *lis pendens*, but effectively so, to prevent a conflict of jurisdiction.

April Sessions, 1849.

Statement.

"The Royal Saxon," a British barque, arrived at Philadelphia in October 1847, and on the 17th of November following, Magee issued *a foreign attachment from the Supreme Court of Pennsylvania* and attached her as the property of one *M'Intyre*, the defendant in the attachment suit. The sheriff of Philadelphia County executed this writ; placing his officer on board, who retained her in his custody until she was sold as hereinafter mentioned.

On the 15th January 1848, this same Magee presented his petition to the court from which his attachment had issued, praying a sale of the barque as chargeable, and obtained a rule for her sale, which, after argument in behalf of the captain and owners, was made absolute on the 29th. The barque was accordingly sold by the *sheriff* on the 9th of February 1848, when Ward, the real defendant in

APRIL SESSIONS, 1849.

this suit, bought her for $2800, and the sheriff delivered her to him.*

On the 21st January 1848, *Wall and al. mariners, libelled the barque in the Admiralty* for wages. Process was issued on the same day; (that is to say, *eight days before* the order of sale from the Supreme Court) the marshal returning specially "attached the barque Royal Saxon, and found a sheriff's officer on board, claiming to have her in custody." Other libels followed in quick succession: among them one of the 22d January, by the master, for wages: and one on the 25th, by a mariner, for wages. To these libels the marshal made a like return.

STATEMENT.

On the 25th January 1848, the master of the barque presented to the *District Judge in Admiralty*, a petition, reciting the foreign attachment of Magee, declaring his inability to procure bail to relieve the barque; that he had not funds to pay the wages of the mariners; (the mariners having remained with the barque in expectation of continuing the voyage;) that the barque was at a daily expense, and concluding with a prayer that the court would interfere "by ordering a sale of her." To this prayer was appended the approval of the British consul for this

* The process of foreign attachment in Pennsylvania, is a writ by which the sheriff attaches a non-resident debtor by all and singular his goods and chattels... in whose possession soever the same may be .... so that he appear in the court from which the writ issues. "*The goods and effects of the defendant* in the attachment shall after such service be bound in the hands of the garnishee—(the person in whose possession they are) by such writ," and if susceptible of it shall be taken into possession by the sheriff. After judgment against the defendant, the plaintiff may have execution "*of the estate and effects of the said defendant attached as aforesaid.*" If the goods attached are of a perishable or chargeable nature, the court will order them to be sold. (*Act of June* 13, 1836. *Sergeant on Foreign Attachment*, 23)

port. *An order of sale was accordingly issued by the District Judge*, and on the 15th of February 1848, she was sold a second time, by the *marshal*, for $1600, to Mr. Taylor. At this sale, Ward publickly notified to all persons his title under the *sheriff's* sale, and that any claim derived from the marshal's sale would be contested by him. The marshal executed a bill of sale and delivered the barque to Mr. Taylor.

Mr. Taylor being thus in possession, under the marshal's sale, of the barque which Mr. Ward had bought under the sheriff's sale, the latter gentleman, on the 24th February 1848, issued a replevin out of the Supreme Court of Pennsylvania, and having given the sheriff the bond required by law, in double the value of the barque, "conditioned to prosecute the suit with effect and without delay, and for duly returning the barque in case a return should be awarded," *the sheriff replevied the barque from the possession of Mr. Taylor*, delivered it again to Ward and summoned Mr. Taylor as defendant; who responded by causing an appearance to the suit to be entered by counsel.

STATEMENT.

While the replevin suit was thus pending, Mr. Taylor, in his turn, now filed this libel in admiralty (the present suit) for the re-possession of the barque; alleging in his libel "that the said barque was *wrongfully* withheld from him."

On this state of facts, which were all disclosed by the pleadings—the pendency of the replevin being pleaded in abatement, and also generally by way of bar—three questions arose.

April Sessions, 1849.

I. Has the District Court, sitting as a Court of Admiralty, jurisdiction of this case, or power to entertain a petitory as distinguished from a possessory suit, and so determine the question of title to a ship?

II. Did Taylor obtain a good title to the barque as against the other claimants, through the proceedings and sale made to him under the authority of the Court of Admiralty?

III. If so, can he sustain this suit, notwithstanding the pendency of the replevin suit in the Supreme Court of Pennsylvania for the same property?

The District Judge, was of the affirmative opinion on all three points.

Mr. Waln and Mr. G. W. Biddle for Ward.

For Mr. Ward's title.

This is a petitory suit as distinguished from a possessory one, that is to say, it is a suit whose object is to determine the title of the ship; not the mere possession of it. The English Admiralty, at no time since our revolution, would have entertained such a suit. Sir W. Scott tells us* "that it was *formerly* held, for a very long time, and down to no very distant period, to be within the jurisdiction of this court to examine and pronounce for the title of ships on questions of *ownership*. It was not till some time after the Restoration," he says, "that it was informed by other courts that it belonged *exclusively to them*. Since that time," he adds, "this court has been very cautious *not to interfere at all in questions of this nature*." In a prior case,† he refused to entertain a suit for possession; the property being litigated and doubtful: and many years after-

* The Aurora, 3 Robinson, 133-6, A. D. 1800.

1st Point. Jurisdiction in Petitory suits.

† 3 Robinson, 93.

wards* he speaks of the Admiralty as being "very abstemious in the interposition of its authority on questions of title." In a third case† still later, he says: "It considers itself and is bound to consider itself as moving within very narrow limits, if it proceeds at all, originally, upon a question of title." In the matter of *Blanshard*,‡ the K. B. refused to grant a prohibition to the Admiralty "to take a vessel from a wrong doer and to deliver it to the rightful owner;" it being assumed by the K. B. that the Admiralty would not have proceeded, if the defendants had "pleaded their *title*." The case of *The Tilton*,§ which will be cited on the other side, is in point against us; but it is not binding as authority on this circuit: and the opinions, as to Admiralty jurisdiction of the eminent Judge who decided *De Lovio v. Boit*,‖ have never yet received higher approbation than that which he gave to them, at different times, himself. Clerke, whose Praxis Supremae Curiæ Admiralitatis will be also cited, though a good author, is a very old one; having lived in the time of Elizabeth. He is therefore no authority in a case where a change is asserted to have been made about the time of Charles II.

April Sessions, 1849.

* The Warrior, 2 Dodson, 288. A. D. 1818.

† The Pitt, 1 Haggard's Admiralty Reports, 242. A. D. 1824.

‡ 2 Barnewall & Cresswell, 248.

§ 5 Mason, 465.

For Mr. Ward's title.

‖ Story, J. 2 Gallison, 398.

II. Suppose this court may pass upon the title, who has the title? The sale under the foreign attachment was a judicial sale; of which the effect is "a transfer of all the rights of property to the highest bidder, so that he cannot be disturbed by lien creditors or mortgagees, who have not made resistance to the decree; nor after sale and confirmation by any claimants of title to any part of the estate levied; because the decree extinguishes (*purge*) all

2d Point. Effect of sale on Foreign Attachment.

APRIL SESSIONS. 1849.

rights of property, mortgages, incumbrances and quitrents in default of opposition."* This principle which has been adopted from its convenience and justice, by the common law, comes to it in truth from that very system administered here, that is to say, the civil and maritime law† The sale transferred all liens from the barque to the fund produced by the sale of it. This undoubtedly is true in the case of judgments on real estate, or of executions on personalty, where the Supreme Court constantly refer it to their auditor to settle the right of claimants to the fund. In a leading case‡ in the Supreme Court of the United States, the practice was applied in Admiralty, and the wages of sailors sustained against the *proceeds* of the ship which had been forfeited for the acts of the owner. "The lien," says Judge Story, "re-attaches to the thing, *and to whatever is substituted for it.*"

* Corporation v. Wallace, 3 Rawle, 109–26; quoting *Ferriere Dict. de Droit, Verbo 'Saisie Reelles'.*

† id. The Madonna, 4 Robinson. 161.

‡ Sheppard v. Taylor, 5 Peters, 675, 710.

For Mr. Ward's title.

It is vain to say that the interest of the owners in the barque—which was all that the foreign attachment sold—was the barque incumbered by legal liens. It is just as true that an execution creditor who, last of all creditors, levies on personalty, can sell nothing but the defendant's interest, that is to say, can sell only the property subject to the lien of former executions. Yet all prior executions are divested. Indeed foreign attachment is a proceeding *in rem*. The debtor is attached by "his goods and chattels." The execution is to be out "of the estate and effects of the said defendant attached as aforesaid."§ It is the thing which is taken possession of and sold, not the defendant's reversionary or resulting interest in the thing.

§ *Ante.* p. 312. Statement, *n.*

III. Admit the general jurisdiction of this court to pass on questions of title, and that Mr. Taylor is the owner. Can this court decide that he is owner? Decide so now, while that very question will be passed upon by the Supreme Court of the State on a writ of *replevin* which issued and was completely served prior to the time when the libel here was filed? Technically speaking, perhaps the plea of *lis pendens* may not apply: for that is pleaded only where the suit is brought by the same plaintiff against the party filing the plea. But the pendency of the suit of replevin is pleaded generally in bar; and the question is not one of *lis pendens* technically applied, but a question of comity arising under our complicated system of State and federal jurisprudence. Look at the effects in this very case. The marshal of this court is expected to deliver to Taylor the barque which only an hour, perhaps, before, the sheriff of another court had taken from him and delivered to Ward. That the Supreme Court of Pennsylvania is competent to decide this question of property must be conceded. A replevin is the precise form of action in which to raise the question, and Mr. Taylor has actually appeared to the summons in such a suit. Here then that court had got clear and competent possession of the matter before this court heard of the difficulty at all. Will this court take the matter out of its hands? even if it could do so. But suppose that that court or its suitors should interpose; that Ward again replevies, and that Taylor again files a libel. What is to be the effect? Either an unending and senseless counter-impetration of writs, or else a conflict between this

3d Point. Effect of pendency of replevin in the State court.

For Mr. Ward's title.

APRIL SESSIONS. 1849.

court and the Supreme Court of the State. To state this case is to decide it; and hence it has passed into a maxim, that in all cases of concurrent jurisdiction, the court that first gets possession of the subject must determine it eventually.*

*Smith v. M'Ivor, 9 Wheaton, 532.

The ship Robert Fulton† is in point: The sylabus is, "the sheriff having attached the vessel under the process of the State court, it was held that the marshal could have no authority to take it out of his possession, but should have so returned to prevent a conflict of jurisdiction." *Hagan* v. *Lucas*,‡ applies the same principles to final process, so as to prevent "a most injurious conflict of jurisdiction."

† Paine, 620.

‡10 Peters, 400

For Mr. Taylor's title.

Mr. F. W. HUBBELL and Mr. HOOD for Taylor.

‡ Clerke, Praxis Supremæ Curiæ Admiralitatis, § 41-2.

The English Admiralty always has maintained‡ and still does maintain jurisdiction in petitory suits. It is true that in cases involving long and intricate inquiries of fact, which cannot be well decided without the aid of a jury, it has sent the questions of fact elsewhere for trial. But in simple questions of law, whether involving title or possession, it still entertains the jurisdiction. At furthest, it is said to have been "very abstemious in the interposition of its authority," or "bound to consider itself as moving within very narrow limits."

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§3 Robinson, 133.

‖ 2 Dodson, 288.

In *the Aurora*§ and *the Warrior*,‖ cited on the other side, Sir W. Scott did consider the question of title; in the former case deciding on its insufficiency: in the other, taking no action upon it. So he did in the Pitt,¶ declining to pass on it from the difficulty of getting at the truth of the facts. *The Lagan*,**

¶1 Haggard's Admiralty, 240.

** 3 id. 418.

though called a cause of possession, was in truth a question of title: the right to possession, indeed, often settles title. *The Experimento** was clearly one of title, though disputed between British and *foreign* subjects, and Sir W. Scott there denies that the Court of Admiralty cannot look "a little" into title. In the matter of *Blanshard*,† the Court of K. B. refused a prohibition to prevent the Admiralty taking a vessel from a mere wrong doer and delivering it to the owner: and argue from the higher power of the Admiralty "in disputes between owner as to the employment of the ship," that "as part owners of a vessel have a distinct though undivided interest in the whole vessel, they cannot be considered as absolute wrong doers by the act of using a vessel of which they are the proprietors." With regard to the power to settle the title generally, the Chief Justice, according to the least favourable report‡ says, "I do not say whether they may or *may not* try the question of right." The case in the Admiralty sought to be prohibited was, as appears by the report of it,§ a dispute between the original owner of a ship and the purchaser upon a sale by the master abroad. It did therefore involve title. The grounds of the refusal of Admiralty to act, are stated by Lord Stowell in *the Pitt*, already cited. "Where the possession is gained by force and violence, or by a fraud manifest upon the very face of the transaction; or where the party in possession is avowedly entitled only as a minor owner in opposition to the majority of interests, there the court feels no hesitation; ***but where a course of transactions involving fraud is objected, it declines entering into the question, and leaves***

APRIL SESSIONS, 1859.

*2 Dodson, 38,42.

1st Point. Jurisdiction in petitory suits

†2 Barnewall and Cresswell, 244-9; reported somewhat differently on this point, as Baxter v. Blanshard, 3 Dowling & Ryland, 177-84.

For Mr. Taylor's title.

‡3 Dowling & Ryland, 177-84

§The Partridge, 1 Haggard's Admiralty, 81.

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it to be determined by the inquiry of courts which have ampler means of arriving at the real truth, and the real justice of the case; for there may be some incidental matters—such as repairs and other expenses, requiring the application of equitable principles which this court may not feel itself competent to administer.

1st Point. Jurisdiction in petitory suits.

I may, therefore, lay it down as a rule for the conduct of this court, that it is only in simple cases, in cases which speak for themselves, that it can act with effect; but in those which, being complex, *require a long and minute investigation*, it cannot proceed with safety."

For Mr. Taylor's title.

The question here is one of mere law; whether a sale under the process of Admiralty, of a vessel previously sold because of her chargeable nature, while in the hands of the sheriff under an attachment for debt gives the preferable title? It is a question perfectly within the faculties of this court. It has none of the difficulties which made Sir W. Scott "hold his hand and desist from ulterior measures" in *the Pitt*, where there was "a series of transactions charged on the one side to be fraudulent, and on the other, deemed not to have the slightest mixture of fraud in them:" and where "many documents" were not "forthcoming, which upon such a question ought to be produced." But whatever may be the law in England, the matter must be considered as settled by the investigation and judgment in *The Tilton*,* where the exact point was decided by Judge Story. This case, if not binding as a technical "authority," will yet receive the highest respect.

*6 Mason, 465.

2d Point. Effect of sale on Foreign Attachment.

What then, next, has Mr. Ward got under his attachment? Nothing more than an execution in it

could give him, i. e. the "estate and effects" of the defendant subject to all its infirmities. The defendant had neither "estate nor effects" here, but such as were bound by the lien for wages. The sale has not divested them any more—much less indeed—than it would divest an admitted mortgage on the barque. *Reed* v. *Fawkes** is in point. It decides that "a fi. fa. levied on a vessel will not divest a previous lien acquired by the libellant in Admiralty."

For Mr. Taylor's title.

* 9 Porter, 623. Syllabus.

Indeed, the attachment from the Admiralty having been served before the order of sale by the Supreme Court was made, the possession of the ship was in the Admiralty, to which the foreign attachment creditors should have transferred their claim: and the possession of the sheriff as against the Admiralty ceased or was suspended, and with it the jurisdiction of the Supreme Court to order a sale as chargeable. Both officers could not hold, and the title of the Admiralty was paramount. The order of sale, therefore, by the Supreme Court was invalid, and the sale so likewise.

2d Point. Effect of sale on Foreign Attachment.

The remarks on the other side about executions and reference to an auditor don't apply.† When was a lien for mariner's wages ever enforced by a common law court, or any where but through the organs of the Admiralty? The idea of sailors being bound by a State court auditor's notice of distribution and so "for ever debarred," is a novelty. Neither is the foreign attachment a proceeding *in rem* in the sense of the civil or Admiralty law, or in any sense other than a *fi. fa.* is so. It is a mere mode of compelling the appearance of a non resident debtor, by attaching *his* property and rights of property.

† Walters v Pratt, 2 Rawle, 215-8.

April Sessions, 1849.

The third point, the *lis pendens*, is disposed of by Judge Story,* in a case very similar to this; the libel having been brought to enforce the lien for freight under a charter party. The parties to the replevin, he says, are not the same. The suits are not of the same nature, the replevin being founded on tort; the libel on contract. Then the replevin acts in *personam* as to the judgment: the libel exclusively *in rem*. "The Admiralty," he adds, "does not attempt to enter into any conflict with the State court as to the just operation of its own process, but it merely asserts a paramount right against all persons whatever, whether claiming above or under that process." Then, again, the plea of lis pendens applies only where the plaintiff in both suits is the same, and both are commenced by himself. The ground of the plea is given by Bacon,† as being because "the law abhors multiplicity of actions." It is the *duplex vexatio*.

* Certain Logs of Mahogany, 2 Sumner, 589–92.

3d Point. Effect of Pendency of Replevin in State Court.

† Abridgment Tit. Abatement M.

As to comity, the case in *2d Sumner*‡ is conclusive. The marshal there took the mahogany logs out of the hands of the sheriff: and a process of courtesy is destroyed by a single infraction.

‡ p. 589. Certain Logs of Mahogany.

The Court's Opinion, July 11th.

Grier, J. "It is certainly true, (says Lord Stowell,* in speaking of the High Court of Admiralty in England,) that this court did formerly entertain questions of title to a greater extent than it has lately been in the habit of doing. In former times, indeed, it decided without reserve upon all questions of disputed title, which the parties thought proper to bring before it for adjudication. After the restoration, however, it was informed by other courts, that such matters were

*2 Dodson, 289.

1st Point. Jurisdiction in Petitory suits.

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The Court's Opinion. July 11th.

not properly cognizable here, and since that time it has been very abstemious in the interposition of its authority." As few cases could arise (unless between part owners,) in which the question of possession when entertained would not necessarily introduce as an incident, the question of title, the Courts of Admiralty in England have been for a time almost wholly deprived, by the unreasonable jealousy of the common law courts, of a jurisdiction which they were peculiarly suited to exercise, and which has been at last restored to them by statute.* Recent cases in the Supreme Court of the United States,† although not directly in point on the present question, show that the Courts of Admiralty of the United States, have not considered their jurisdiction restrained to the narrow, and sometimes absurd limits lately imposed by the courts of common law in England. Although I am not disposed to go the length of *De Lovio* v. *Boit*,‡ I feel no difficulty in giving my assent to "*The Tilton*,"§ which is to the point on the question now under consideration.

1st Point. Jurisdiction in Petitory suits.

† Waring v. Clarke, 5 Howard, 441; N. Jersey Steam Navigation Compy. v. Merchant's Bank, 6 Howard, 344.

‡ 2 Gallison, 398.

§ 5 Mason, 465.

II. That the title acquired by Mr. Taylor to the barque Royal Saxon, was good against all the world, will hardly admit of an argument.

2d Point. Effect of sale in Foreign Attachment.

The attachment issued out of the Supreme Court of Pennsylvania, reached only the title of the defendants in the action. The sale by the order of the court, gave no higher title than if sold on an execution of the same court. The purchaser took the title of the defendants whatever it was, subject to the liens or rights attached to the vessel.

*Stat. of 3 and 4 Victoria, c. 65, § 4, expressly authorizing the Admiralty "to decide all questions as to the title to, or ownership of any ship or vessel, arising in any cause of possession or otherwise."

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2d Point. Effect of sale in Foreign Attachment.

The lien for mariners' wages attaches to the vessel, in whosesoever hands it may come, with notice of the claim. It is said to be "nailed to the last plank." If she has been wrongfully seized by belligerents, and restitution of the value is afterwards made, the mariners' lien will cleave to the proceeds.* The proceedings in the State court were not *in rem*. The rights of the mariner against the vessel can only be prosecuted in a Court of Admiralty which proceeds *in rem*, and has exclusive jurisdiction of the subject matter. The vessel is not attached as the *debtor*, but the property or right of the defendant in the suit is distrained to compel his appearance. The purchaser in the State court might have intervened in the District court, and released the vessel by entering stipulation with sufficient sureties to satisfy the liens. He bought with full notice; for the proceedings in the District court were pending at the time of his purchase. If he has suffered a sale in the Admiralty for liens which adhered to the vessel when he bought her, his title is divested as completely as if he had bought lands on execution which were afterwards sold on a mortgage which was the oldest lien upon the property.

*Brown v. Lull, 2 Sumner, 441.

THE COURT'S OPINION. July 11th.

The case of "*Certain Logs of Mahogany*"† is directly in point as to this question. There, it was decided that the pendency of a replevin, in which the title and possession of the property was litigated, was no bar to the prosecution in Admiralty of a claim which was a lien on *the thing*, and sought a remedy against it, irrespective of possession, ownership or title. To this extent we concur fully with the learned Judge who decided that case, but it has

†2 Sumner, 519.

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been cited to support doctrines in which we do not concur, and which were not intended to be advanced by the court in that case, and which we shall notice more fully hereafter.

For these reasons, I feel no doubt of the correctness of the decision of these two questions by the learned Judge of the District Court.

3d Point. Effect of pendency of replevin in State Court.

On the third point stated, I am sorry after much reflection and examination, to be compelled to differ from that court.

The plea of *lis pendens*, in courts of common law, will be allowed to abate the writ only where the first suit is brought by the same plaintiff against the same defendant for the same cause of action. It is founded on the principle that the law abhors a multiplicity of actions, and that to allow a man to be twice arrested or twice attached by his goods for the same thing would be oppressive. It is plain that the plea in this case could not be sustained on these technical grounds, as plaintiff or libellant in this suit was defendant in the replevin suit instituted by the claimants in the Supreme Court of Pennsylvania.

But, I apprehend, the question before us depends on broader and different principles, and such as will support this plea either in abatement or in bar.

It will not be denied that the Courts of Pennsylvania have full power and jurisdiction to seize a ship lying in the port of Philadelphia with a writ of replevin, and to decide the question of possession and property between the parties claimant. And although it has been denied, and probably will be

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hereafter, that the District Court as a Court of Admiralty, has the same jurisdiction, to decide the question of title, we will assume that question as settled, at least for the purposes of the present case.

We have then, two equal and independent tribunals with concurrent jurisdiction of the parties, and the subject matter in contest.

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The State court has first taken cognizance of the question of possession and property between these parties. And if it were an action of trespass where the same question might be collaterally decided in a suit by A. against B. in one court, that might arise in a suit by B. against A. in the other, it may be admitted that the pendency of such a suit in one court, would be no bar to a proceeding in the other, merely because the same question was involved and might be decided.

But we have something more. The State court has taken possession by her officer of the *thing*, or subject matter in controversy, and disposed of it according to law. It is true the court have not decided the question of property between the parties; that is still pending; but until that question is decided the possession of the matter in dispute is disposed of according to the law of the land.

Originally the action of replevin was a remedy for an illegal distress; and when the property distrained was delivered to the plaintiff on a writ of replevin, it became as much under his control, and as liable to be taken in execution for his debts, as his other property. The bond is substituted in court in place of the thing distrained, and the lien of the

distress is gone.* In Pennsylvania a writ of replevin lies in all cases where one man claims personal property in possession of another. But the same consequences must result when the distress or taking is only fictitious, and the title and right of possession are the real matters in dispute. By virtue of the writ of replevin, the sheriff seizes the property; it is taken into the custody of the law. But as it would be injurious to both parties that the property should be so retained, the sheriff is ordered by the writ to deliver it into the custody and possession of the plaintiff, on his giving sufficient pledges. If the defendant or party in possession claims title, the sheriff does not hold an inquisition to try the question, nor does any writ *de proprietate probandâ* issue; but the defendant is allowed to retain the possession by giving what is called "a claim property bond." When this is done, the suit proceeds as a common action of trespass *de bonis asportatis*. The plaintiff recovers in damages the value of the property, and the only advantage which he gains by his action of replevin, is the security which he has obtained for the damages he may recover. The delivery to the defendant is final; no *retorno habendo* ever issues for delivery of the specific thing to the plaintiff, or *withernam* to compel it. In fact, whatever the defendant's title may previously have been, it becomes indefeasible by his "claim property bond," which is substituted for the property, and has the effect, like a recovery of damages in trespass, to confer a good title on the trespasser. If the sheriff were to deliver possession to the plaintiff according to the letter of the writ, without any judgment of the court on the question of title, or any inquisition by the sheriff, or

*Woglam v. Cowperthwaite, 2 Dallas, 68.

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writ *de proprietate probandâ* without regard to the defendant's claim of title, it is plain that very great abuses might be committed.

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But practice has shown that these abuses are sufficiently restrained by giving the person who has the actual possession, which is *prima facie* evidence of title, the first right or refusal, of taking the property into his possession during the contest about its title, and in fact of perfecting his title as against the plaintiff in the writ, by substitution of his bond.

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But if the person in possession and claiming title, does not desire to retain it on these conditions, the sheriff in obedience to the command of his writ, delivers the thing seized to the plaintiff, taking sureties or pledges for the ultimate sufficiency of which the officer and his sureties are liable.

The plaintiff having thus obtained the possession by process of law, has the *legal* possession. The title of his antagonist is transferred to him in consideration of his bond, liable only to recaption if found in his possession by a writ of *retorno habendo;* In practice, this writ is seldom or never resorted to, unless to have the formal return of "*elongatur.*"

If the plaintiff has sold and delivered the property to another, the sheriff cannot seize it on a writ of *de retorno habendo;* but if not found in possession of the plaintiff, he must necessarily return his writ "*elongatur.*"

If ever a case should arise, in which the restoration of the identical property for some peculiar reason, should be preferred to a recovery of its value,

a writ of *withernam* would lie to compel the plaintiff to restore it, and if he had sold it, to purchase it again. But whether the replevin be to restore a *real* or fictitious distress, the title and possession of the plaintiff to the things are considered as good and defeasible only in case of recovery by defendant, and a reseizure on writ of *retorno habendo*.

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The plaintiff's replevin bond has been substituted in the court by consent of the defendant, and by process of the law, for the property in dispute: if the plaintiff prosecute the suit with effect, or if the defendant recover his damages, the title of plaintiff is absolute and indefeasible, and his possession continues to be legal till taken from him by process of the same court which gave it to him.

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But on this subject we are not without cases directly in point, which confirm the views here taken. In the case of *Morris* v. *De Witt*,* it has been decided that a writ of replevin by defendant to obtain a re-deliverance of the property taken from him by virtue of a writ of replevin issued against him, is irregular and will be quashed. The court say, "the law has provided guards against abuses in practice under the writ of replevin. It would be a very useless proceeding, if the defendant in replevin has a right to turn round and bring his action of replevin, and thus regain possession of the property which has been legally taken from him. If such a proceeding were permitted, there would be no end to suits, and the benefits of this action would never be realized. The title to the property in question must be tried upon issue regularly joined, and until such trial, the party from whom the property has

* 5 Wendell, 71.

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been taken by due process of law, must remain out of possession, unless it is restored to him on his claim of property."

*2 Watts & Sergeant, 129.

Lowry v. *Hall*,* also asserts and confirms the views which we have taken. A raft of lumber had there been delivered to Lowry on a writ of replevin, in which Hall and others were defendants, in the State of New York. When the raft was brought into Pennsylvania, Hall took out a replevin here, Lowry pleaded the delivery to him on a replevin in New York, as conclusive evidence of his title, and a bar to a second replevin between the same parties in this State. The court below decided that an adjudication of the question of property in New York would have been conclusive, but the mere pendency of an earlier replevin there *was not*. The Supreme Court reversed the judgment, on the ground that whatever may have been the previous rights of the parties, after the delivery in replevin to one of the parties, he had not only the right of possession but of property also, till actual re-deliverance by process from the same court. "After the execution of the first replevin, then (asks Chief Justice Gibson) who had a right to the possession of this lumber by the law of New York? Unquestionably not he from whose possession it had been taken by the authority of that law and committed to the custody of an antagonist claimant, to abide the event of the suit." Again, he remarks, "it is unnecessary to contend that his title becomes absolute in form by the eloignment, for it is enough that the ownership is taken to be in him, till his title is disproved by the trial of the issue. But the property has been

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delivered to him as his own, on the basis, real or supposed, of having been wrongfully taken from him, and as possession is *primâ facie* evidence of title, *delivery* to him, after a claim of property which admits the taking, is so too; at least it settles the right to treat it as his own, till it be adjudged to belong to another.

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It is clear, therefore, that the Supreme Court of Pennsylvania would not have entertained a second replevin, if Mr. Taylor had brought his suit in that court; not only because it would be oppressive to compel the opposite claimants a second time (and if a second, then any other number of times,) to give sureties for prosecuting their claim to the barque, but because, by operation of law, the proceedings in the first replevin, have vested the right of possession in the party to whom it was delivered in the first writ. The pendency of the first replevin, would therefore be a valid plea, not only in abatement but in bar. And if the second replevin had been issued in the District Court of the City and County of Philadelphia, which has concurrent jurisdiction with the Supreme Court, it is plain that they must sustain the plea, not only on the well established principle "that in cases of concurrent jurisdiction, the court which first has possession of the subject must determine it conclusively,"* but because the pendency of the first writ shows conclusively that the party in possession has a *legal* possession, which the plaintiff in the second replevin is estopped to deny; the disposition of the property by the law during the pendency of the litigation, being as conclusive on the parties as the final decision of the court on the ques-

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*Smith v. M'Ivor, 9 Wheaton, 532.

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tion of title. These points being (as we think,) conclusively established, it remains only to inquire whether a Court of Admiralty, a court of concurrent jurisdiction receiving her authority from the United States, is bound by the same rules of comity and of law, or may disregard the disposition made of the property now in dispute by the law and courts of Pennsylvania, and anticipate the decision of a controversy already submitted by the parties to the State tribunal.

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The Court of King's Bench in England, treating the Court of Admiralty as an inferior tribunal, have refused to sustain a plea in abatement, that the plaintiff had libelled the defendant in Admiralty, for the same cause of action.* But while the Supreme Court (the King's Bench,) of Pennsylvania, could not treat the Court of Admiralty deriving her power from the United States, as an inferior court, so neither can the latter disregard the pendency of process in the State courts, where they have concurrent jurisdiction. The principle that the first tribunal which has possession of the subject matter, should be left to determine it conclusively, is not founded on mere comity, but on necessity and to avoid the unpleasant collision of jurisdictions which would otherwise ensue. Where, as in the present case, the courts derive their power from different sovereigns, there is the greater reason and necessity, why "*uberrima comitas*" (if I may be allowed the phrase,) should be observed to avoid a conflict. It would exhibit a humiliating spectacle, to have a ship delivered by the State officer to Ward yesterday, restored to Taylor by the Court of Admiralty

* Bacon's Abridgment, Tit. Abatement, M.

to-day—to be re-taken by process from the State court to-morrow, and so on alternately. April Sessions, 1849.

The fact that the title of one party was acquired under the judgment and process of the Court of Admiralty, and that of the other under the State court, furnishes no reason why either court should consider itself bound to warrant or sustain the title emanating from it. It is to be presumed that justice will be administered according to law, in either court, and Mr. Taylor's title, and the well known principles of maritime law on which it is founded, will be sustained in the State court, as well as here. The Court's Opinion. July 11th. 3d Point. Effect of pendency of replevin in the State court.

But it is denied that this is a case of concurrent jurisdiction, because of the different form and course of proceeding in a Court of Admiralty. This proceeding it is said is *in rem*, that all the world is a party, while the action of replevin is a mere personal action of trespass; that in the one case, the thing passes into possession of the court, in the other, the delivery is made by the officer without any order or judgment of the court.

These distinctions, though ingenious, do not constitute a difference or furnish an argument to justify the Court of Admiralty in disregarding the disposition made of this property by the law of Pennsylvania, whether it be temporary or final. By that law Ward has a good title to the possession of this property as against Taylor, till the court by whose process it was delivered to him, shall award a return of it.

And why is not the process of replevin as much a proceeding *in rem* as the petitory or possessory

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action in the admiralty? The forms of process and course of proceeding will differ of course, one being modeled on the common law and the other on the civil law. The caption of the suit in one case is against the thing, with a citation to the parties claiming and in possession, whoever they may be found to be. In the other, the claimants are first ascertained and made the parties at once. In either case, the officer of the court takes the subject matter in contest, into his possession. In Admiralty, the court order it to be delivered to one of the parties during the contest, on his stipulating with sureties; in the State court, the officer delivers it to one of the parties according to fixed rules of law. In either case, the thing itself is disposed of by the legal process of the court, and the question of title is afterwards contested. In Admiralty, where cases are more spedily decided, the property is often detained till a decision of the question of title, and is then delivered to the successful party.

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It is true, that the Court of Admiralty, from the peculiarity of her process and modes of proceeding, is more competent to render speedy and exact justice to the parties, than the courts of common law, (more especially in disputes between part owners,) but it cannot, on that assumption, disregard their acts and process, or anticipate their decisions. The proceeding in the one court, is in fact just as much *in rem* as in the other. The barque has been seized by the officer in each court, and has been delivered to one of the claimants, during the pendency of the litigation. And neither court has a right to disregard the process or judgment of the other.

The delivery by the sheriff in one case, is as conclusive between the parties, as the interlocutory order or judgment of the admiralty in the other. April Sessions, 1849.

The case of "*Certain Logs of Mahogany*,* already noticed, has been relied on as authority for supporting the judgment of the District Court on this point, and if this were a proceeding against the vessel to enforce a bottomry bond or mariner's wages, which follow the vessel, whether the party in possession has taken it by writ of replevin or in any other way, that case would be an authority to which we would willingly assent. But the point now before us did not arise in that case, nor can we receive the arguments used by the learned Judge, which were conclusive in the case before him, as having any bearing whatever on the point now under consideration. The Court's Opinion. July 11th.

*Ante. p. 324, 2 Sumner, 589.

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JUDGMENT WITH COSTS ACCORDINGLY.

(APRIL SESSIONS, 1848, NO. 24, COMMON LAW DOCKET.)

BLANCHARD VS. ELDRIDGE.

[ASSIGNMENT OF PATENT RIGHT: PARTIES TO SUE.]

Where a transfer of certain specified privileges, *part* of larger privileges secured by patent right, does not confer a legal title to the whole, or to an *undivided* portion of the right, nor grant the *entire* or exclusive right within a specified part of the United States, a suit for an infringement of one of the privileges transferred, is properly brought at law, in the name of the original holder.

For example: B. having a patent for turning irregular forms *generally*, grants to C. the full and exclusive license, right and permission, to use it for turning *shoe lasts*. D. having infringed the patent by turning shoe lasts, it was held—that suit for the infringement was properly brought at law in B's. name.

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STATEMENT.

BLANCHARD had brought a suit, *in his own name, at law*, and recovered damages for an infringement of a patent he had obtained for turning every kind of irregular forms. In the course of the trial, however, the defendant was allowed to show, that prior to the bringing of the suit, Blanchard had assigned to one Carter, "the full and exclusive license, right and permission to have, hold, use and enjoy Blanchard's patent for turning irregular forms, &c. *so far as said improvement is or may be used for turning shoe lasts, boot and shoe trees and hat blocks, and also for turning spokes for wheels of all kinds of carriage wheels, and all other articles that form any part in the construction of carriages.* To have and to hold the said *right* and *license* exclusive of all others, except such persons as have received grants or licenses before the date hereof," &c.

The infringement proved on the trial was, that of making *shoe lasts*, that is to say, an infringement of

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one of the rights and interests granted exclusively to Carter.

Mr. Hirst for the defendant, having moved for a new trial, relied among other reasons for it, upon the fact of this transfer to Carter; his argument being, that as Carter was the "party injured," and had the "exclusive right," *he* was the only person entitled to an action; and that the plaintiff, having parted with all right to use the machine for the purpose of making *lasts*, &c. over the whole United States, could not support an action for the infringement.

Reason for new trial.

The Patent Law,* it is requisite here to state, enacts, "that every patent shall be assignable in law either *as to the whole interest or any undivided part thereof*, &c. which assignment, and also every grant and *conveyance of the exclusive right* under any patent to make, use, and to grant to others to make and use, the thing patented *within and throughout any specified part or portion of the United States*, shall be," &c. and makes no other provision about assignments.† And also that the act requires the action for an infringement to be "brought in the name or names of the person or persons interested, whether as *patentee, assignees, or as grantees, of the exclusive right within and throughout a specified part of the United States.*"

*Act of July 4, 1836, § 11: 5th Statutes at Large, 121.

†id. § 14.

Mr. F. W. Hubbell and Mr. Saunders Lewis, cited a MS. report of a recent decision in the New York Circuit, upon this identical assignment, in which it was held by Judge Nelson, that suit was properly brought in Blanchard's name.

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GRIER, J. The point here raised by the defendant's counsel is not without its difficulty, and the force of his argument cannot be evaded if his assumption be true, that this deed transfers the legal title to Carter of that portion of the patent, which it purports to vest in him. But if it does not so operate, it cannot be noticed in a court of law and cannot affect the case.

THE COURT'S OPINION.

As the grants of the crown were, at common law, construed with the greatest strictness, the privileges granted by a patent for a monopoly, would probably not have been treated as capable of assignment, unless made so by the letter of the grant. Since the statute 21 James I.,* patents for useful inventions (notwithstanding the statute itself mentions the "*inventor*" only,) have always granted the privilege or monopoly to the inventor, his executor, administrator and *assigns*. These monopolies are, therefore, assignable as other personal chattels, by force of the grant which creates them.

Ch. 3d, § 5.

As a chattel also, it might be held by two or more joint owners: hence any undivided portion or interest in the whole as an unity might be assigned, and if the original grantee died, such assignees might join in an action for an infringement of their right.† "But the patent right itself was insusceptible of local subdivision."‡ As a privilege or monopoly, it was an entire thing, indivisible, and incapable of apportionment.§

† Boulton v. Bull, 2 Henry Blackstone, 463.

‡ Whittemore v. Cutter, 1 Gallison, 429-431.

§ Brooks v. Byam, 2 Story, 525.

But the act of Congress of 1836, has regulated the assignment of patents. The eleventh section provides, that a patent shall be assignable 1st. As to

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the whole interest. 2d. As to any undivided part thereof, and 3d. An exclusive right may be granted throughout any specified part or portion of the United States. The fourteenth section requires the action for an infringement of the patent, to be brought "in the name or names of the person or persons interested, *whether as patentee, assignees*, or as *grantees of the exclusive* right within and throughout a specified part of the United States." The word "assignees," in this section, must be construed by reference to the eleventh section, already referred to, which defines in what way a patent may be assigned—to wit: either the whole or any undivided portion of the whole. This statute also renders the monopoly capable of subdivision in the category of its locality, but in no other way. The patentee is not allowed to carve out his monopoly, which is an unity, into a hundred or more, all acting in the same place, and liable to come into conflict. The grant to Carter by the deed under consideration, is not of the whole monopoly, nor of any undivided portion of the whole, and though for an "exclusive right," it is not exclusive of all others within a certain district, or specified part of the United States: on the contrary it is an exclusive right to use the machine for a specified purpose. A machine for turning irregular figures may be used for numberless purposes. If the patentee or his assignees can assign to A. an exclusive right to use the machine for making shoe lasts, to B. for turning spokes, to C. for axe handles, and so on to the end of the alphabet, then may he, out of his one monopoly carve out a thousand others, each subdivision, like a polypus, being itself a several

The Court's Opinion.

April Sessions, 1849.

monopoly, and having a separate existence in the *same place*. What endless perplexity and confusion must necessarily arise from the establishment of such a doctrine. Suppose the monopoly granted by this patent parcelled out to some twenty sub-monopolists, with an exclusive right to each to use his machine for certain purposes, in any given place: what remedy could A. have against B. for an infringement of his special privilege? The patentee or grantor, might restrain his grantee of a machine for a special use, by a covenant; but as between the several grantees no action could lie, although they alone might suffer from a breach of the covenant.

The Court's Opinion.

But it is sufficient for purposes of the present inquiry, that the act of Congress has not given a legal sanction to such transfers or assignments, nor subjected even a pirate of the machine to fifty different suits by fifty several assignees, whose several interests might be affected, if a patent could be thus split up into numerous exclusive rights, or sub-monopolies. Whether the deed confers on Carter and his assigns more than a special license, or what remedy a court of equity might be disposed to extend to him, where his rights are infringed, it is not necessary now to inquire. As it does not confer a legal title to the whole, or an undivided portion of the patent, nor grant "an exclusive right within a specified part of the United States," it cannot be received to affect this case. It was wholly irrelevant and ought not to have been received in evidence.

It adds to my confidence in the correctness of this

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view, that, as I have been informed, my brother Nelson has ruled the question in the same way in the second circuit.

NEW TRIAL REFUSED.

[OCTOBER SESSIONS 1847, NO. 6, COMMON LAW DOCKET.]

WILSON VS. BARNUM.

[FEIGNED ISSUE: PRACTICE.]

Where a feigned issue for trial of a fact is directed by the court, no declaration of any sort is requisite. The case is put on the trial list and the jury sworn to try the issue, in the words of the order of issue itself.

April Sessions, 1849.

Statement.

The court having directed from its equity side, an issue of fact for trial by a jury, Mr. ST. G. T. CAMPBELL and Mr. S. V. SMITH for the plaintiff, filed a formal declaration, in the old fashioned way, setting forth a fictitious conversation that had been moved between the parties, a consequent dispute, wager, &c. Mr. HIRST and Mr. W. W. HUBBELL made an objection to the declaration as not embodying, in a full and issuable way, the matter directed to be tried. After some argument on both sides, as to whether the declaration did do this or not, the discussion was cut short by the opinion of the court thus given:

The Court's Opinion. Oct. 5th.

GRIER, J. The old fashioned and cumbrous machinery by which these issues of fact have been

hitherto managed is entirely useless; and the matter to be tried is only involved by it in a mass of words signifying nothing. Now, especially, since wagers of all sorts, have been discountenanced as illegal by the Supreme Court of Pennsylvania,* there is no propriety in the old form; and it may as well be swept away at once, as the relick of a barbarous age. In the present issue, and in all future ones in this court, the matter can be put on the trial list at once, and the jury be sworn to try in the form and in the words set forth in the order of issue. There is no necessity of a declaration or pleading of any sort.

April Sessions, 1849.

The Court's Opinion. July 5th.

* Edgell v. M'Laughlin, 6 Wharton, 176.

[APRIL SESSIONS 1849. NO. 6. EQUITY DOCKET.]

WEAVER VS. THOMSON.

[PRACTICE: APPEALS: AMENDMENT OF LIBEL.]

An appellee in Admiralty may amend in *this* court the libel he has filed in the District Court, so as to make a claim here for damages above costs, caused by a vexatious appeal.

The District Court having given a decree in Admiralty, the libellee, who had been cast, appealed to this court. The libellant below—the appellee here—now setting forth that the appeal was for delay merely, and vexatious, and that he had been greatly injured by the mere fact of the delay; Mr. VANDYKE asked leave to amend the libel originally filed in the District Court, so as to make a further claim for damages, above costs, thus caused by appellant's act.

April Sessions, 1849.

Statement.

April Sessions, 1849.

The Court's Opinion. Oct. 5th.

Grier, J. I have repeatedly expressed my design of discouraging appeals here, unless there was some substantial grounds for them, in a manifest error in the decree of the court below. In questions particularly of mere fact, and in those, like salvage, depending on sound discretion, I discourage them because they lead to speculations on the temperaments and dispositions of the respective judges, and are taken on a little besides a calculation of chances. Where the want of ground for the appeal is so obvious, as to shew that the case must have been carried up here for delay merely, I see no objection to allowing a party to recover damages for any injury done by the delay to which he has thus put his opponent in a vexatious and unreasonable way.

Amendment Allowed.

(OCTOBER SESSIONS, 1849, NO. 11, COMMON LAW DOCKET.)

PARKER VS. KEMPTON.

[JURORS' FEES.]

Jurors living at a distance, and not receiving mileage at adjournments, are entitled to a per diem for those days *during* which the jury stands adjourned, as well as for those *to* which it stands adjourned, and on which the jurors appear and answer to their names.

Oct. Sessions, 1849.

This case having been called on Monday morning, and being then fixed for Thursday following, the jury were discharged until the latter day. Some of

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the jurors coming from a distance, and the marshal, as it appeared, not being allowed, under the regulations of the treasury, to pay other mileage than at the beginning and end of the term, the court upon the application of one of the jurors who came from Harrisburgh, gave it as their opinion, that the jurors who came from a distance should be allowed a *per diem* for those days during which the pannel stood adjourned, and not merely, as is the case in regard to jurors living within the city and districts, *on* those days to which they were from time to time adjourned, and on which they appeared and answered to their names.

October 29th.

(APRIL SESSIONS, 1849, NO. 13, COMMON LAW DOCKET.)

LOW VS. HAUEL.

(PRACTICE; FORM OF INJUNCTION.)

By the practice of the third Circuit, no money penalty is inserted in an injunction.

Oct. Sessions, 1849.

Low having obtained a decree of perpetual injunction against Hauel for using certain trade-marks, Mr. G. M. WHARTON for the former party, presented a form of injunction in the English form, commanding and enjoining the defendant "under the penalty of $—— to be levied upon his lands, goods and chattels," henceforth to desist, &c. Mr. GUILLOU objected that by the practice of this circuit, as appeared by many injunctions which he had examined on the files, a pecuniary penalty was not inserted except in special cases; the remedy being always by attachment.

Oct. Sessions. 1849.

KANE, J. It is not usual in this circuit to insert a pecuniary penalty, though one is almost always found in the English forms. There was a case here, sometime since, where a penalty being inserted, the matter was said to be misunderstood. The defendant professing to understand it as an alternative, proceeded to violate the injunction, finding it more profitable perhaps to pay the penalty, than to desist from his work.

October 29th.

MONEY PENALTY NOT INSERTED.

(OCTOBER SESSIONS, 1849, NO. 2, EQUITY DOCKET.)

WILSON VS. BARNUM.

(VALUE OF GRANT OF PATENT: INJUNCTION. SECOND TRIAL.)
(DIVIDED COURT.)

The grant of a patent at the Patent Office, is not of itself, or in virtue of § 7 of the act of July 4th, 1836, a bar to an interlocutory injunction in favour of a person claiming to be a prior patentee of the same thing; such person not having received notice at the Patent Office to appear and be heard, and the court on a hearing before it, being well satisfied that the last patent is an interference with the one granted before.

The District Judge sitting for the Circuit Court, and being himself well satisfied of an infringement—although, of numerous experts examined, a majority thought differently from him on that point,—may grant an interlocutory injunction to restrain the use of a patented machine as an infringement of a prior one; the machine last patented not having been granted after notice from the Patent Office to the complainant, to appear and be heard.

Where a jury has had a case before it and disagreed, a second trial cannot be had by another jury from the residue of the panel. The case must go over in order that it may be tried on a new venire.

Where the District Judge, sitting for the Circuit Court, and being satisfied of an infringement, had granted an interlocutory injunction till trial, to restrain the use of a machine, and the President Judge, after hearing the evidence before the jury on the trial, differed from his brother, who after hearing the same evidence, still retained his former opinion, and the jury could find no verdict; the full court, in its subsequent action on the injunction, need not consider itself either as bound or as unable to dissolve it: but the action upon it may be modified; the modification being largely regulated by what probably would have been the original action of a full court.

Oct. Sessions, 1849.

1st Point. Statement.

This was a bill for an interlocutory injunction, to restrain the defendant from using a *patented* machine which it was said interfered with another machine previously patented to the complainant. The defendant did not deny the originality of the complainant's invention, but asserted his own to be no infringement of it. The complainant's patent was an ancient one. The defendant's had been granted under an act* which directs, that whenever a person applies for a patent, an examination shall be made

*Act of July 4th, 1836, § 7.

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by the commissioner of patents into the originality of the alleged invention; and allows the issuing of a patent, only in case the commissioner is satisfied that the invention is original. If on examination the commissioner thinks that there is an interference, he then gives* notice to the patentee, with whose invention he supposes that the interference takes place, and lets him be heard. In this case the commissioner did not consider that there was an interference, and of course the complainant had no notice of the intended issue to the defendant.

*Act of July 4th, 1836, § 8.

Against the injunction.

Mr. Hirst and Mr. Stoughton of New York, relying, among other grounds, including those of fact, upon this first provision of the act, opposed the grant of an injunction. The defendant, they contended, has a PATENT which gives him a *primâ facie* case every where. He has a right to trial by jury. It was impossible to regard his machine as *so* palpably or so probably an infringement, as to warrant the summary process of injunction, when the commissioner of patents, who has every means at command for ascertaining originality, and employs them all, has regarded it as too *manifestly* original to cause a question. The act of the commissioner may not have been a judicial decree in form; nor have the technical conclusiveness of a precedent, and a *res adjudicata*. But it deserves every respect short of that, and will receive the highest respect as the investigation and a decision on the matter by an officer of state, to whom the investigation and decision are primarily and particularly intrusted. It is *quasi* judicial at least.

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For the injunction.

Mr. W. H. SEWARD of New York, Mr. ST. G. T. CAMPBELL and Mr. S. V. SMITH, mentioned several cases where the commissioner had issued patents, *after notice* to prior patentees who came in and defended their rights, which patents had been afterwards pronounced, judicially, to be infringements. In this case there had been no notice to the complainant or to any body. The commissioner issued the patent upon first impressions. He had not perceived any infringement, only because none had been shown to him. His act was extra-judicial; and if it were not, would be at best but a judgment without either writ, plea, issue or argument. Even if there had been a hearing, the grant could not be a *legal* objection. It could not be pleaded nor put in evidence. It would at best be an extra-judicial opinion of more or less weight. If this court—after a judicial examination—is thoroughly satisfied of the interference, it will not regard such an act as conclusive on its conscience.

THE COURT'S OPINION.

Justice KANE. June 2d.

KANE, J. sitting for the Circuit Court. There are cases under the present laws, in which the court would enter reluctantly upon the discussion of the validity of a patent. Some of the provisions of the act of 1836, give a quasi-judicial character to the action of the commissioner of patents; and it has accordingly been held, I believe generally, as well as justly, that the patent itself is to be taken as *prima facie* evidence of the novelty and usefulness of the invention specified in it.

There are other cases, in which the official action of the patent office claims properly, a still higher de-

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gree of consideration. Whenever antagonist patentees, or third persons generally, have been first called in, it is reasonable to consider the action as a preliminary adjudication upon their rights. And this for the obvious reason, that they have been parties, or but for their own fault might have been parties, to the proceeding on which the adjudication was based.

The Court's Opinion.

Justice Kane. June 2d.

But this is the limit, beyond which comity cannot be required to go. It cannot be asked, that a third person shall have his legal rights impaired, or his legal remedies impeded, by any proceeding to which he was not, and could not have made himself a party. To hold ourselves concluded by the action of the patent office, where that action has been without notice, would be as perilous to the interest of inventors as to that of the publick. We had a case in our own court not long since, where an injunction was sought against the real inventor, on the faith of a patent granted to a surreptitious claimant. The grant of a patent to the defendant can therefore have no other effect on the present discussion, than as it indicates the opinion, which highly respectable and skilful officers have formed, on an *ex parte* examination of the case.

ORDER ACCORDINGLY.

2d Point.

Statement.

This preliminary question being disposed of, an elaborate investigation was made as to the infringement in fact. The opinion of Mr. Justice Kane, sitting for the Circuit Court was, that there was an infringement. The testimony of many experts had been taken, and there was a direct conflict of opinion between them; the majority, however, being of opinion that the new machine was no infringement.

In these circumstances the defendant's counsel argued that there was the greatest reason for leaving the case to a jury. There was no conflict of evidence as to the *facts* in the case. The conflict was in the conclusions arrived at by the different gentlemen upon the facts.

Oct. Sessions, 1849.

2d Point. Statement.

Kane, J. My only embarrassment in awarding an injunction, has been owing to the fact, that of the highly educated mechanicians whose affidavits have been taken in the cause, the greater number have expressed an opinion different from that expressed by me. The consideration which was pressed in the argument, that the responsibility of deciding this question, might with propriety be devolved on a jury, has had no influence with me. That judicial morality might be impeached for infirmity, which could shrink from awarding to a party his remedy after ascertaining his rights. "The right of a party to the most speedy and effectual protection against a meditated wrong, is as complete as his right to redress for wrongs already inflicted; and the accident of position confers no right on one party, whether he be plaintiff or defendant, at the expense of the other. The special injunction in equity, like the arrest on mesne process at law, may be abused to the injury of an opponent; but it is no less on that account the duty of the judge to further them both, when, in the exercise of his best discretion, he believes that they are called for by the merits and the exigency." This was the language of the court when on a former occasion this patent was before us, and my experience since has not taught me that it ought to be modified. The preventive interposition

The Court's Opinion.

Justice Kane. June 2d.

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of equity, is very often the only effective resort of a meritorious patentee, and where the facts of the case are not controverted, I am by no means satisfied that it is not the safest for both parties.

The Court's Opinion.

Justice Kane. June 2d.

There is no conflict of evidence here: the question is one of deduction and opinion. Were the case at this time under trial at bar, it would be the office of the judge to interpret the specification, and define the principle of the invention. This is the only point of difficulty, and it must be encountered by the judge, when he sits on one side or other of the court.

To send the cause to a jury, would be to delay its adjudication for many months, leaving the complainant in the meantime with his legal rights suspended, and swelling the measure of the defendant's liabilities. I should do injustice to both parties, were I, with my present views of the merits of this controversy, to refuse the injunction.

INJUNCTION AWARDED.

3d Point. Statement. November 1st.

At the following sessions, the validity of the patent came on to be tried upon an issue directed to a jury: but after a thorough examination and argument, the jury could not agree and were discharged.

Mr. Hirst and Mr. W. W. Hubbell, having now shewn that a great number of licenses, *about to expire within a fortnight*, were waiting for renewal upon the decision of the right, and that it was otherwise very important to their client and the publick, that the right should be decided at once; moved for a second trial at this same term, by a new jury selected out of the existing panel, instead of waiting

as they would otherwise have to do, until the next session, a term of six months. Mr. St. G. T. CAMPBELL opposed the application. Oct. Sessions. 1849.

GRIER, J. An application of this same sort was made to me in a case while I presided in the District Court at Pittsburgh, where the case went off by withdrawing a juror. A decision from one of the Ohio or Indiana courts was then cited in support of the motion. In consequence of that decision, I looked thoroughly into the matter at the time, and was satisfied that the decision was not founded in principles of the common law and was wrong. I have no doubt that a settlement of this patent right, at once, is important, but it cannot be tried now except by consent. There must be a second *venire*. The Court's Opinion. November 1st.

MOTION REFUSED.

On a subsequent day, it having appeared by a communication from the bench that the court, after full argument on the evidence, were divided on the question of infringement, and the jury having been unable to find a verdict, Mr. HIRST and Mr. W. W. HUBBELL, moved to dissolve the injunction absolutely. It had been granted by the District Judge, they argued, in the absence of his brother, who now after full examination, came to the conclusion that there was no infringement. Had the latter judge been present when the injunction was applied for, the court being divided, would not have granted it: and if it could, would not. A jury had moreover refused to pronounce that there was any infringement. This, supported by the action of the patent office, which regarded the invention as original, and by the 4th Point. Statement. For dissolving the injunction. November 5th.

Oct. Sessions, 1849.

patent which gave a *primâ facia* right, made a clear case for a jury alone.

For continuing the injunction. November 9th:

Mr. W. H. SEWARD, Mr. ST. G. T. CAMPBELL and Mr. S. V. SMITH, in favour of continuing the injunction, argued that the act of either judge, sitting for the Circuit Court, was the act of the court. As a Circuit Court, each judge is of absolute equality. It is impossible to say, what the circuit judge's opinion would have been, had he heard the argument for the injunction. That is a matter past and gone, and of which no judicial cognizance could now be taken. Each judge was satisfied of the correctness of his own opinion: and whether each chose to rely on his own, or each to defer to his brother's, the court would still be equally divided. In that state of things, what could be done? Simply nothing. The injunction would stand of its own force.

The inability of the jury to find a verdict, Mr. Seward argued, was of no significance. They had been summoned to settle the matter, and they had not settled it, but left it where it was. Had they even found a verdict, it would have been of little value unless approved by the court, who, if disapproving of it, would have set it aside. No verdict was of no value.

The Court's Opinion. November 13th.

GRIER, J. expressing the high respect he entertained for the opinion of his brother KANE, particularly upon questions relating to patents, and KANE, J. stating that from the time he found that a difference of opinion existed between him and the presiding judge upon the question of infringement, his inclination was to have the matter disposed of, as if the

Grier & Kane, J. J.

court had been full when the injunction was applied for: and both members of the court—in the difference of opinion which existed between them, and which it seemed could not be removed—being desirous of protecting both parties to the suit from any errours which might exist by either dissolving absolutely, or absolutely continuing the injunction, made an order to this effect: That the injunction should be dissolved if the defendant in ten days should give security in $10,000 to keep an account, &c. and pay, &c. in case of a final decree being entered against him. On his failure to give such security, then in case the complainant should in ten days afterwards give security in $20,000, the injunction to stand: and in default of his giving such security, to be dissolved without condition.

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The Court's Opinion. November 13th.

(APRIL SESSIONS, 1849, NO. 6, EQUITY DOCKET.)

(OCTOBER SESSIONS, 1849, NO. 12, COMMON LAW DOCKET.)

BOND VS. THE SUPERB.

[GENERAL AVERAGE.]

A removal in a port of necessity, for the purpose of repairs, of perishable fruit, which increased an incipient decay and precipitated an entire loss of the fruit, is not a matter for general average.

The Superb sailed from Palermo for Philadelphia, with a cargo composed in part of tropical fruits. Bad weather compelled her to put into the port of St. Tho-

Statement.

Oct. Sessions, 1849.

mas, where it was found necessary for the general safety of the ship and cargo to repair her; and in order to do this, to unload and reload part of the fruit. When the fruit arrived at Philadelphia, some of it was found good for nothing: and the plaintiff contending that the loss had been caused either in whole or in part by the act of unloading, &c. which was necessary for the general welfare, made claim for *general average*. To what extent the fruit had been injured by the operation at St. Thomas, was not clear; but it appeared, rather, that the decay had *commenced* before its removal, and that the motion and delay consequent upon that act, had *accelerated and increased it.*

This court, agreeing with the District Court, whence the case had come by appeal, thought the evidence insufficient to sustain the claim under any assumption of the law. But as the testimony was contradictory, the question was argued, and rested in both courts upon the law also. That part of the opinion is reported.

20th & 31st Oct.

Mr. G. W. Biddle in favour of the claim. Mr. F. W. Hubbell contra.

The Court's Opinion. November 3d.

Grier, J. Where goods are liable to loss or deterioration which arises solely from an inherent principle of decay or corruption, the owner cannot claim for general average, notwithstanding the delay of the vessel in the port of necessity, may have added greatly to that deterioration. And this for two reasons: 1st. Because there would be no equality between the owners of perishable goods and those not perishable, and 2d. Because the immediate cause of damage, is what the French writers term the

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"*vice propre*" of the article, and not a damage incurred or sacrifice made either intentionally or incidentally for the safety of the whole. And perhaps a third reason might be added, to which the facts of this case would seem to give weight, and which has caused the memorandum clause in policies of insurance: I mean, because such commodities carrying within themselves the seeds of deterioration, it is difficult, if not impossible, to discriminate the partial injury induced by inherent causes, from such as might arise within the risks undertaken.

The Court's Opinion. November 3d.

It is true, that where the direct and immediate cause of the damage to perishable articles, is some act done for the general preservation, the owner would have the same right to claim for general average, as if the goods had not been in their nature perishable. Such a case is found in *Maggrath* vs. *Church*,* where the damage sustained by some corn, was occasioned by water that got upon it, "in consequence of the cutting away the mast of the vessel for general preservation;" and thus the immediate cause of the damage was not the *vice propre* of the grain, but water which had got upon it by cutting away the mast. The circumstances of the case before us are different. No *direct* injury was received by the fruit in consequence of unloading and reloading it. The decay of the fruit had commenced before its removal; and assuming that its removal did accelerate and increase the natural progress of decay more than its pitching in the hold of the vessel would have done, still it could hardly be said that the removal was the proximate cause of the decay, and not the *vice propre* of the fruit. Yet it is

* Caine's New York Term Reports, 196, 214.

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the proximate cause to which the law looks. "It were infinite," says Lord Bacon,* "for the law to judge the causes of causes, and their impulsion one on another. Therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree." Now if the mere delay which would undoubtedly increase the damage to these perishable articles when it had once commenced, is no reason why the damage, whose immediate cause is the *vice propre*, should not be brought into general average, we can see no reason why the removal which may have increased, not caused the injury, should have a different doctrine applied to it.

* Maxims of the Law; Regula 1.

The Court's Opinion. November 3d.

But the evidence does not establish the facts, &c.&c.

DECREE AFFIRMED.

[OCTOBER SESSIONS 1849, NO. 21, COMMON LAW DOCKET.]

WEAVER VS. THE S. G. OWENS.

[FOREIGN AND DOMESTICK VESSEL: JURISDICTION, LIEN: SHIP CHANDLERY.]

For the purposes of enforcing a lien given by a State law against domestick vessels, and where the national character is not in dispute; the person rightfully in possession, navigating the vessel for his own use and profit, by officers and mariners appointed and employed by himself, will be considered the owner, whether he be lessee, mortgagee, or parol vendee, notwithstanding some other person may be the registered owner and have the *legal* title or general ownership in himself.

The District Court of the United States has power to enforce the lien on domestick vessels under the Pennsylvania statute of June 13th, 1836, which, though providing, almost entirely, for a process of enforcement through the State courts, does yet not exclude, but in one section, contemplates the action of the Federal court.

"Ship chandlery," is a term of extensive import, and includes every thing necessary to furnish and equip a vessel, so as to render her seaworthy for the intended voyage. Accordingly not only stores, stoves, hardware and crockery, were held to be within the term, but muskets and other arms also;—the voyage being round Cape Horn to California, in the course of which voyage, arms are sometimes carried for safety.

OCT. SESSIONS, 1849.

STATEMENT.

The ship S. G. Owens was *registered* in the district of *Maryland*, as the property of Mr. Buck and others, her owners, resident in Baltimore. On the 21st of February 1848, being then at *Philadelphia*, she was made the subject of an agreement by the owners, who "*do by these presents sell* said named ship to H. & S. Townsend." Part of the money was to be paid on the execution of the agreement, and the balance on certain days thereafter. The new purchasers, the Townsends, agreed "*to forfeit all claim of ownership on the said vessel,*" provided they fail to perform their portion of the contract; and the other parties agree that when the money is all paid, they will have the ship "*legally* transferred" to the Townsends. *The registry was not changed.*

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This agreement was made and executed at Philadelphia, where the Townsends were: but they were not residents there in the ordinary sense of that word. They seemed to be mere adventurers who came there for the occasion, one of them intending to take passage in the ship for California, which was to be its first destination. They took possession of the vessel, to fit and navigate her for their own use and profit, and appointed her officers and seamen. They then proceeded to fit her out on an expensive scale for two hundred and fifty passengers, and laid in stores for a two years voyage.

Statement.

The contracts with the material men and others, were not made by the Townsends in person. The captain, sometimes alone, sometimes in company with the father of one of the partners, who acted as the agent of the concern, gave orders, and they were executed in all cases on the credit of "*the vessel and her owners.*"

The Townsends paid the money required to be paid on the execution of the agreement, but could pay no more: and on the 25th April transferred their contract and the outfits of the vessel to Evans of Philadelphia, who paid the purchase money on the vessel, and had her registered anew, in his own name. Between the date of the agreement with the Townsends and the date of Evans' purchase, the libellants furnished certain matters to the ship, for which this libel was filed.

It is requisite here to state, that an act of the Pennsylvania Legislature, declares,* that vessels of all kinds, "built, repaired or fitted within this Common-

*Act of June 13th, 1836, § 1.

wealth, shall be subject to a lien for all debts contracted by the masters or owners thereof, for work done or *materials found or provided* in the building, repairing, *fitting, furnishing or equipping* of the same." But it confines, by express words,* this lien, to "carpenters, blacksmiths, mast-makers, boat-builders, block-makers, rope-makers, sail-makers, riggers, joiners, carvers, plumbers, painters, *ship-chandlers*, coppersmiths, brass-founders, coopers, venders of sail-cloth and lumber-merchants." Any one of these persons,† "may file a libel in the office of the *District Court or Court of Common Pleas of the proper county*, wherein the cause of action shall arise, or in any county where the said ship may be found." On the filing of this libel,‡ writs, whose forms are prescribed by the act, both for mesne and final process, and issuing from a "*county*," are given by "*the Commonwealth of Pennsylvania to the sheriff of said county.*" If there are more libels than one, there may be a consolidation of suits § Questions of fact are to be "tried by a jury of the *county*."‖ But the act, forbidding any attachment to issue against a vessel already sold or held, by the District Court of the United States,¶ provides, nevertheless, that if the payment of her debts prior to the time of sale, shall be decreed by the said court, "the lien shall continue until the payment thereof shall be enforced by the process of *such* court." A complete system of enforcing the lien is provided by the act in the State court, and *this is the only allusion to the courts of the United States in the act.*

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* Act of June 13th, 1836, § 3.

† § 4.

‡ § 8.

§ § 9.

‖ § 13.

¶ § 9.

Statement.

In this state of facts, the libellants, *trading as "ship chandlers,"* had filed claims for ropes, ship tools, sea stores, provisions, glass and Britania ware, china,

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crockery, pencils, and varieties of hardware, including cooking stoves, cooking utensils, muskets and other arms, furnished, as has been already said *after* the time when the Townsends became interested in the vessel, and *before* the transfer to Evans. The testimony of several shopkeepers and nautical men proved that, in their understanding, ship chandlery was a word of very extensive import, including every thing that could be wanted, on, in or about a ship's service. And in a printed advertisement of the plaintiff's, for the sale "of ship chandlery," were

Statement.

enumerated near two hundred articles, including quills, ink and ink-stands, letter-paper, table-spoons, tea-spoons, knives, forks and cork-screws, besides a great number of items of hardware, and a general announcement of "crockery" and "tin-ware." It appeared also that guns were taken for defence upon a California voyage, round Cape Horn.

The following questions accordingly arose in the court, where the case came on appeal:

I. Whether, as regards the port of Philadelphia, the ship was a foreign or domestick one.

II. Whether if a domestick one, the District Court of the United States could enforce the lien given by the Pennsylvania statute against domestick ships.

III. If it could, whether such articles as those furnished in this case, were within the terms "ship chandlery," and such accordingly as "ship chandlers" could claim a lien for.

Mr. G. M. Wharton and Mr. Kennedy for Evans.

For the ship owners. 1st and 2d Nov.

There is no lien under the general maritime law. For all the purposes of lien the vessel, by the agreement of February 21st, had passed to the Townsends.

The language is, we "*do sell.*" These persons resided in Philadelphia, so far as they resided any where. The vessel was in her home port and a domestick vessel; a case where no lien attaches for supplies.*

1st Point. A domestick vessel.

* The General Smith, 4 Wheaton, 438.

II. The Pennsylvania statute does not give a lien which the *courts of the United States* can enforce. That act designed to create and enforce in courts of the State, a lien which neither existed nor could be enforced elsewhere: and it simply gives admiralty process to the State courts, in certain cases where none existed in the admiralty itself. The admiralty is not once mentioned in the act, except to prevent a conflict with the State jurisdiction. The process prescribed by the act, testes from a "county," and is from a State to a "sheriff." The act provides for consolidation of suits and trial by jury; proceedings unknown to the admiralty. It is a State affair in its very source; and the act itself, as it ought to do, and as it had the power alone to do, enforces its protection through courts where it had power to enforce them, if any where, and not in this court where it has no power at all. The provision in the ninth section refers to the case of foreign vessels against which the act gives a lien as well as against domestick ones, which may be held by the United States process in virtue of general principles.

2d point. The District Court would not enforce the Pennsylvania lien.

For the ship owners. 1st and 2d Nov.

But in the last place, the act never meant to give a lien for such articles as are embraced by this claim. The court has decided that it gives no lien to stevedores.† It embraces no more, those persons who supply sea stores, provisions, or articles for passengers' use merely. The context of the section, and the class of persons embraced by it, shew that it

3d Point. Ship chandlery a limited term.

† *Post.* M'Dermot vs. the S. G. Owens.

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meant to protect those persons alone who furnish articles used in or about the vessel itself. Stores are used by the passengers.

1st Point. For the libellants. 31st October, 1st and 3d November.

DONEGAN & BARNES for the libellants: *There is a lien under the general admiralty law.* The agreement with the Townsends was not a sale. The registry remained unchanged. The ship was never "*legally transferred;*" and the Townsends, having failed to pay the balance of the purchase money, "forfeited all claim of ownership." The owner of the vessel was therefore always at Baltimore: that was her home port: and it is a foreign port so far as Philadelphia is concerned.

1st Point. A foreign vessel.

2d Point. The District Court will enforce the Pennsylvania lien.

II. *The admiralty may enforce the State lien, if the ship is not foreign.* The ninth section of the State act, itself, declares that if the admiralty shall hold or have sold the vessel, no process shall issue from the State for the lien which the act gives: and provides that if payment of her debts prior to time of sale be decreed, the lien shall continue until *payment be enforced by process of such court:* i. e. by the court of admiralty. The act could *give no power to the admiralty to enforce a lien created by the State.* It is enough that it *creates* the lien. It assumes, and rightly, that the admiralty in virtue of its own powers, can enforce a lien already existing. This matter has been decided by the Supreme Court* It provides a State process, where the admiralty don't proceed, only because it could provide no other.

*Peyroux v. Howard. 7 Peters, 324, 341.

3d Point. Ship chandlery an extensive term.

The act does not mean to give a lien for such articles alone as are attached to the ship's hull. It meant to give to a creditor in a domestick port, the same rights that one in a foreign port would have.

An act of Pennsylvania relating to liens on *houses*, confines its lien to "work done or materials furnished for or about the *erection* or *construction*" of the house. But the lien here is "for work done or materials found or provided in the building, repairing, fitting, *furnishing* or *equipping* the ship. It is, moreover, a remedial act and to be construed in advancement of the rights of the "ship chandler," whom it provides for. The evidence is that, in nautical and common parlance, every thing used in or about the ship's service is included by the term ship chandlery.

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GRIER, J. In reference to the question, whether a court of admiralty has jurisdiction to enforce a lien on a vessel given by a State law. I need only say that the Supreme Court of the United States has decided that such a lien may be enforced, and that the point is not open.* The eighth section of the present act I may add, however, contemplates that this lien may be enforced in a court of admiralty as well as in a State court.

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*Peyroux v. Howard, 11 Peters, 324, 341.

The next question is, whether this ship is foreign or domestick, as regards the port of Philadelphia?

The District Court may enforce the Pennsylvania lien.

It is admitted that a vessel owned in a port of any other State, which puts into the port of Philadelphia, would be liable, under the general maritime law of the United States, for repairs made or necessaries supplied, in order to enable her to prosecute her voyage. She is considered for this purpose as a foreign vessel, when in the port of a State where her owner does not reside, notwithstanding her national character as an American vessel remains the same.

What constitutes a domestick vessel.

The enrolment of a vessel is for the purpose of es-

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tablishing her national character and to give her the privileges of an American vessel. In a question of ownership *inter partes*, it is but *primâ facie* evidence of title in the person in whose name she is registered, and liable to be rebutted by proof of actual ownership in another, whether temporary or absolute, as lessee or vendee. It is not necessary to enquire whether by the maritime law the title to a ship can pass by parol. I have no doubt but that by the law of Pennsylvania, the title would pass by actual sale and delivery as in the case of other personal chattels, without any written bill of sale. The formal bill of sale reciting the registry may be necessary for the purpose of enrolment, but as between the parties, and those who deal with the vessel, and where the *national* character is not in dispute, the person rightfully in possession navigating the vessel for his own use and profit, by officers and mariners appointed and employed by himself, will be considered the special owner, whether he be lessee, mortgagee or parol vendee, notwithstanding some other person may be the registered owner, and have the, so called, legal title, or general ownership in himself. If the Townsends had hired this vessel for a year, or for a single voyage from Philadelphia to California and back again, although Mr. Buck in Baltimore, might be the lessor, and registered and general owner of the vessel, with the legal title, yet the Townsends and not Buck, would be considered as owners, as between themselves and all persons dealing with the Townsends, for supplies furnished to the vessel. Neither they nor the captain, their officer and agent, could bind Mr. Buck the registered owner, by any contract made for such supplies. A vessel hired or leased by a

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What constitutes a domestick vessel.

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merchant in Philadelphia from a merchant in Baltimore, for the purposes of a voyage from Philadelphia to California and back again, and furnished and equipped by the lessee in this port, could not be considered as a foreign vessel by those who dealt with the lessee in this place, notwithstanding the legal title and general ownership of the Baltimore lessor. In such case this would be considered as the home port of the vessel.

The Court's Opinion November 13th.

We have in this case not a mere agreement to sell at a future time, but a sale *in verba depresenti*—(we "*do by these presents sell* said named vessel)—an actual delivery to the vendee, and a large sum of money paid to the vendor. It is true there is an attempt to give a defeasible title, on condition subsequent. The vendor has endeavoured in this way to retain a lien in the nature of a mortgage to secure the balance of the purchase money;—whether successfully or not we need not enquire.

What constitutes a domestick vessel.

The Townsends having thus obtained rightful possession of the vessel, with a title (defeasible perhaps on condition subsequent, or as mortgagor) whether legal or equitable it matters not,—proceed to equip her for a voyage to carry passengers from this port to California. They appoint the captain, hire mariners, contract with passengers; and the libellants treat with them as owners, and supply materials to furnish and equip the vessel for her intended voyage. No one supposed he was dealing with Buck in Baltimore as owner, or that the Townsends or the captain appointed by them, could bind Buck by any contract. Buck is guilty of no fraud to the injury of libellants. They treated with the Townsends as owners, who for

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the time at least, resided here. As to the libellants and all who dealt with them, the ship was a domestick vessel, and this her home port. No seizure of the vessel by Buck, under his supposed legal title as mortgagee, would defeat or supersede any liens obtained by the libellants or others against the ship, while in the possession of the Townsends. If the libellants treated with them as the legal owners, they cannot complain, if every remedy against the vessel be allowed them as if such were the actual fact.

The Court's Opinion. November 13th.

What constitutes a domestick vessel.

Under no view of the facts of this case, therefore, can this vessel be treated as foreign.

Being a domestick vessel, then, have the libellants any lien under the act of Pennsylvania, which enumerates *ship chandlers* among the persons entitled to such protection?

3d Point. Meaning of ship chandlery.

Although the council for the owners insist that many of the articles provided by the libellants, as groceries, crockery-ware, cooking stoves and cooking utensils, muskets and guns, are not *ship chandlery;* yet they furnish us with no criterion to test the fact as to what articles are, and what are not within the definition. A chandler is defined by lexicographers, as "an artisan whose trade is making candles, or as one who sells candles." This was the meaning of the term as originally used: but as sellers of candles in course of time, extended their business and assortments so as to include groceries of many kinds, the meaning of the term became more expanded; and we find it used as a synonime for *dealer*. Thus a dealer in corn is called in England a corn chandler.

A "ship chandler" is usually defined, as "one who

deals in cordage, canvass and other *furniture* of ships." Now it has been decided,* that provisions for the use of the crew are included in the term "furniture" of a ship. In fact, "furniture of ships," *ex vi termini*, includes every thing with which a ship requires to be furnished or equipped to make her seaworthy. The testimony of the merchants and nautical men who have been examined on this subject, leaves no doubt that the term is indefinite, and includes *all articles furnished* by ship chandlers, which are almost innumerable. Persons fitting out vessels apply to these persons for every thing necessary for the *outfit*, from a needle to an anchor, including groceries, liquors and all ship stores; in a word every thing necessary to furnish and equip a vessel, so as to render her seaworthy for the intended voyage. The materials necessary to fit, furnish and equip a vessel, must depend on the nature of the voyage. A steam packet and a whaling vessel, would require very different furniture and equipments, both in character and amount. A vessel bound for California with two hundred and fifty passengers, would not be seaworthy for such a long voyage, without immense stores of provisions of all sorts. It is moreover found necessary for vessels going round Cape Horn, to carry arms for the purpose of defence.

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*Brough v. Whitmore, 4 Term. 206.

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3d Point. Meaning of ship chandlery.

The law gives a lien to a ship chandler, and does not *define* or *limit* the *articles* for which he is to have this lien, further than that they shall be used in "*fitting, furnishing and equipping* the vessel;" and every debt contracted by the master or owner of a vessel, with a ship chandler for articles or materials used for any one of those purposes, is within the letter

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as well as the spirit of the act; it matters not by what other names the same article or material may be designated.

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The master and owners of this ship have also given their own definition of ship chandlery, by ordering from the libellants, who as "ship chandlers," advertised these things, to fit and equip the ship with them for the voyage.

DECREE OF THE DISTRICT COURT AFFIRMED WITH COSTS.

(OCTOBER SESSIONS, 1849, NO. 18, 19 AND 20, COMMON LAW DOCKET.)

M'DERMOTT VS. THE S. G. OWENS.

[LIEN: STEVEDORE: COSTS.]

No lien exists in the admiralty for services performed by a stevedore in loading and storing the ship's cargo.

An unfounded claim for lien dismissed without costs, the owners of the vessel having profited by the claimant's services—which constituted a personal demand,—under circumstances not quite honourable.

Statement. 1st and 3d Nov.

M'DERMOTT claimed a lien for labour and services as a *stevedore* in loading and storing the cargo of the vessel S. G. Owens, while lying at one of the wharves of Philadelphia, previous to proceeding on a voyage to California: and the question was whether, admitting the vessel to be a foreign vessel, *he had such a lien under the general maritime law.* As a domestick vessel, it was admitted he had no lien.

Oct Sessions, 1849.

The case was a hard one upon the stevedore: The persons who employed him had become insolvent, and had transferred the ship and cargo, all ready for sea, to the present owners, who took it with knowledge of this and similar claims, but without making any provision for paying them.

See *ante*. p 360.

Mr. VANDYKE in favour of the lien, contended that the duties of the stevedore were essentially maritime, being done *on* the ship and essential to her carrying freight. That, formerly, the *mariners* performed this service of loading and unloading vessels, and had a lien for their wages whether earned in port or at sea: and that it being now found more convenient to have this service performed by labourers on shore, before the mariners come on board or after they are discharged, the stevedore, who is substituted for the sailor, is entitled to the same lien.

Mr. KENNEDY and Mr. G. M. WHARTON, for the owners. 1st and 2d Nov.

GRIER, J. The argument of the libellant's counsel is ingenious, but it wants the support of authority. No decision or dictum has been brought to the notice of the court, which would justify them in treating this as a maritime service. It does not follow because sailors once performed these duties now better executed by landsmen, that therefore they should have the mariner's lien on the vessel. "The services are performed on a contract, which is neither made at sea nor for a service to be performed at sea; both were in the port of Philadelphia, and within the county of Philadelphia. The ship was safely moored at the wharf, and was in the actual possession of

THE COURT'S OPINION. November 13th.

Oct. Sessions, 1849.

the owners: the service had no agency in bringing her in: she was not earning freight." For these reasons (which I quote from the opinion of the court in *Phillips* v. *Scattergood*,*) with others there mentioned, that court decided, that a seaman whose wages have been paid up to the termination of the voyage, but who afterwards remains on board the vessel moored at the wharf, has no claim for services which a court of admiralty will enforce.

*Gilp. Ad. Rep. 3.

The Court's Opinion. November 13th.

The stevedores are usually employed by the owner, consignee, or master, on their personal credit: the service performed is in no sense maritime, being completed before the voyage is begun or after it is ended; and they are no more entitled to a lien on the vessel, than the draymen and other labourers who perform services in loading and discharging vessels.

Judgment must be therefore entered for the owners but without costs, as the court cannot approve of the transaction by which they became the owners of this vessel, without any provision being made for the payment of those persons whose property and labour was expended in fitting her for sea, and which has been appropriated by the owners to their exclusive benefit.

DECREE ACCORDINGLY.

[OCTOBER SESSIONS, 1849. NO. 17, COMMON LAW DOCKET.]

APPENDIX.

No. I. p. 87.

HURST VS. JONES.

[PEDIGREE: HEARSAY.]

The contents of affidavits made *ex parte* several years before to prove pedigree, are admissible as hearsay, even though what was said was in answer to inquiries made by a person interested to obtain a particular answer;—the affidavits having been made, apparently, in compliance with official requirement, and there being no evidence of any actual "*controversy*" on the subject.

The case is somewhat qualified by this circumstance: st.—that it was not quite clear whether the witness swore to the contents of the *affidavits*, or to conversations which preceded them, and on which they were founded.

Oct. Sessions, 1801.

Statement.

In this action of ejectment, the descent of one Frances Smith, through whom the plaintiff claimed, came into question; and to prove the descent, Lewis offered in evidence the deposition of one Morris, regularly taken in 1787. This person stated in his deposition that having, many years ago, made application to the land-office for a warrant of survey under the right of Frances Smith, the secretary refused to issue any warrant until the pedigree of the said Smith should be fully made out; on which he, Morris, in order thereto, made *inquiries of, and had many conversations with ancient people*

OCT. SESSIONS, 1801.

of reputation, and was by them informed, in the year 1768, as follows: [The deposition then purported to state, *in exact phraseology*, what five different persons had said respecting the genealogy in question,] and proceeded: "the affirmant further saith, that he was present and saw the several deponents in the depositions hereto annexed, severally make and subscribe the same." *Certain ex parte affidavits thus referred to, were annexed, made in* 1768, *by the same five persons (now dead) before mentioned; and contained, verbatim, what Morris stated that he heard them mention.*

STATEMENT.

The defendant, prior to 1768 (when the affidavits were made) was in possession of the land now in suit.

Lewis & M. Levy, for plaintiff.

The plaintiff's counsel did not allege that the *affidavits annexed to Morris's deposition* were evidence, nor did they offer to read them; but contended that *Morris's* deposition was admissible as HEARSAY.

E. Tilghman and Ingersoll, for defendant.

The defendant's counsel objected to its introduction. Admitting generally that hearsay was admissible as to pedigree, they contended that it must be mere hearsay; not attempted to be clothed in legal form, but such as was collected from casual, general conversation and information, not having relation to any particular cause, but made a long time ago, and before any dispute stirred. This was the decision in *Strickland's lessee vs. Poole.** If made with a view of serving a particular end or an interested party, the mind is not pure and unbiassed. If in response to interrogatories formally administered,

* 1 Dall. 14. A short note, thus: "To prove pedigree, evidence permitted to be given of hearsay, a great while ago, before any dispute stirred."

there is great danger of artifice; for the interrogatories may be built upon a knowledge of the witness' capacity to speak; and so adjusted as to draw forth all that is favourable to the inquirer, and to conceal every thing beside. OCT. SESSIONS, 1801.

If not evidence in themselves, how can the affidavits become evidence by another person's relating what they contain? The offer is an ingenious attempt to introduce ex parte evidence; for Morris appears to have taken all his information from the affidavits. He does truly say that he had "conversations;" but what he says as to the hearsay is, totidem verbis, what the five affidavits contain. E. Tilghman and Ingersoll, for defendant.

But however this be, you cannot free the evidence from one incurable fault: st.—that all which Morris heard was in answer to his *own inquiries upon the very point now in issue, and when he was interested to establish exactly what it is attempted to establish here.*

Besides: this sort of evidence is admitted only ex necessitate rei; and the necessity ought to shew its extent. Here, the defendant was in possession of the land when the affidavits were made: the plaintiff had notice therefore of the claim, and ought to have perpetuated the testimony in a regular way.

TILGHMAN, C. J. Is it clear that Morris's information is wholly derived from the affidavits? I think not. He says that he had several "conversations" with ancient persons and was informed &c. But regarding the case as the defendant's counsel view it, is that which is stated under the sanction of an THE COURT.

OCT. SESSIONS, 1801.

oath, less persuasive or less likely to be true than the prattle of casual conversation? or is the truth of conversation rendered less probable by being afterwards sworn to? Suppose this case:—A person, hearing another giving an account of the lineage of one whose pedigree he wishes to establish, thereupon asks that other to go and swear to it. Is the statement, when sworn to, rendered less probable? I am not aware

THE COURT.

that any Court has decided that the only declarations admissible are those dropped in passing conversation; nor do I see that the value of the declaration is essentially impaired because responsive to inquiry, or even to interested inquiry; provided no controversy has been stirred. Suppose, that being interested to know my descent, I go to an aged friend and ask him such and such questions, and he tells me what he knows: is not this hearsay, and admissible? subject of course to the restriction which I have named, that it must be made before controversy moved.

For the rest, I do not see that any controversy had been stirred in 1768, when these affidavits were made; and I therefore think that Morris's deposition should be submitted to the jury. Under the Court's direction, they will decide upon its credibility and weight.

GRIFFITH J. I agree with the Chief Justice. Hearsay is admissible when made ante litem motam. That is this case. The present suit, it is admitted, was not stirred when the affidavits were made; nor, in fact, were they made in any controversy properly so called. The secretary of the land-office, it would

appear, wanted a chain of title produced for his own satisfaction. The rules of his office probably required that the evidence of an applicant's title to a warrant should appear among the records; and Morris produced such evidence. So far as appears, there was no dispute nor doubt as to the descent; nor was there any opposing claimant of the warrant. I infer that the affidavits were made in compliance with the technicality and routine of office. They are, then, nothing more nor less than sworn declarations ante litem motam. I do not see that the jurat destroys their credibility; for if that which is dropped in the laxity of conversation be credible, why ceases it to be so when reduced to form, and sworn to after calm, solemn and thoughtful recollection?

OCT. SESSIONS, 1801.

THE COURT.

The case from *Dallas* does not conflict with our opinion; for that case is inclusive rather than restrictive.

In short, while I have always admired the wise sentiment of Lord Talbot, that it is better to suffer a particular mischief than a general inconvenience; and feel in great strength, that the rules of evidence are founded upon large, general principles never to be broken away by the hardness of circumstances, I must yet admit, that in excluding this deposition we should narrow a rule of law beyond what is found in precedent. I may add, at the same time, that I should not be disposed to go greatly further than we do in this case.

[Cas. Temp. Tal. p. 242.]

BASSET J. If we give to the deposition that favourable interpretation which in support of probable

OCT. SESSIONS, 1801.

intent human language may reasonably claim, it will by no means appear that Mr. Morris records only what is found in the affidavits. On the contrary; he had been inquiring in regard to the subject; "had many conversations with ancient people;" and as he might remember generally that the essence of what he learned was accurately set forth in their affidavits, we can understand why he presents documentary language (if it be the fact that he does so) rather than the less accurate recollections of an exhausted memory. I agree with the Chief Justice and my brother on the other points. In 1768, when the affidavits were taken, there does not appear to have been what, in the understanding of law, is a "controversy stirred;" and though I was, at first, much oppressed by the argument that what Morris heard was in answer to his own inquiries made on the very point now in question, and with an interested view; yet I think, upon the whole, that as the witnesses must be presumed to have been indifferent, as they cannot be regarded as officious volunteers; what they stated is not to be rejected purely because it was in answer to inquiry, or because (being, doubtless, desired so to do) they attested with their oath what they had said in conversation. The evidence ought to be received; but is open, of course, to observation from the court.

THE COURT.

DEPOSITIONS RECEIVED.

No. II.

THE PEA PATCH ISLAND:

AN ARBITRATION BEFORE

THE HONOURABLE JOHN SERGEANT, OF PHILADELPHIA.

[BOUNDARY BETWEEN NEW JERSEY AND DELAWARE.]

The territory of the State of Delaware within "the twelve miles circle," extends across the Delaware river to low water mark on the Jersey shore.

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STATEMENT.

About the year 1783–4, there appeared at low tide in the Delaware river, about five miles below New Castle, a small muddy exposure of the soil, "about the size," as was testified, "of a man's hat." By the force of alluvion and deposit the exposure became larger and larger, until, by degrees, it formed an island of about 87 acres, which in consequence of a tradition that a vessel laden with peas had once sunk on the spot where the island afterwards rose, got the name of the PEA PATCH ISLAND. In 1784, the Proprietaries of West Jersey granted this island, describing it as situate in Salem County, New Jersey, to persons whose title became afterwards vested in Dr. Henry Gale of that State; and in 1831, the same State, by an act of its Legislature, relinquished to Dr. Gale whatever interest it might have in the island. It had previously declared that its west boundary, at this place, came to the middle of the main channel of the Delaware river, a location which, as the main channel was then supposed to run, included the Pea Patch Island as within the territory

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of New Jersey. In 1813, the State of Delaware, by an act of its Legislature, conveyed the island to the United States, who soon after took possession of it and began to erect a fortress upon it. In consequence of these two grants, a controversy as to the right to the island began between Dr. Gale, claiming under the title of New Jersey, and the United States claiming under that of Delaware. In the ordinary case of a dispute as to title between an individual and the Government, the matter would not have attracted publick notice; but this case differed in several respects from an ordinary case. In the first place, it brought in question the boundary between the States of New Jersey and Delaware; and to common apprehension it brought, moreover, some disparagement to one State or the other, both of which had apparently treated the island as within its own limits; and both of which, it was asserted, had granted it away, as its own property. Publick attention was moreover directed to the matter from the accidental position of the island itself. Above it lie many principal towns or cities of the three States of Delaware, Pennsylvania and New Jersey, which could be readily devastated by an enemy's fleet unless the river was protected from below; while it so happens, from the width, the course, or the shifting character of the Delaware channel, that there is scarcely any point either above or below, that offers a place where adequate defences could be erected for any of them. This island, however, constitutes the key of defence of the whole river. It stands just in the centre of its entrance and commands its two channels, of which the deepest runs close along its side, and the other is

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so curved as to lie for a great distance directly and most favourably exposed to its guns. A fortress had been partially erected on the island by the United States during the war of 1812, but was destroyed by fire some years after. And all the towns along the Delaware river, lying, as already stated, naked to attack from any enemy who might pass up it, were kept in great uneasiness during those many years in which the Maine Boundary, the French Indemnity, the M'Cleod Arrest and the Oregon Boundary had kept our relations with the two great naval powers of France and England in uncertainty, and put them, at times, in danger of immediate rupture. Of course, they were constantly imploring Congress to complete or rebuild the fortress upon this island, the only place, as all agreed, where an adequate defence could be erected; while at the same time the New Jersey claimants would appear with assertions of title to the island, *fortified by written opinions from the law officers of the Government itself*,* and by remonstrances from citizens of New Jersey against such an unlawful invasion of their territory as was contemplated by assuming possession of the island, except under grant of the individual proprietor. In addition to this, the matter had attracted attention from a great number of unsuccessful attempts—necessarily publick ones—by the Departments and by Congress to settle it; from an uncommon number of opinions of directly opposite conclusion, from lawyers of publick name, both those connected with the Go-

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* The Hon. G. D. Wall, D. A. U. S. for New Jersey, J. S. Green, Esq. holding at a later date, the same office, and Mr. B. F. Butler, A. G. U. S. had all given opinions in favour of the right of Mr. Humphrey, claiming under the State of New Jersey.

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vernment and those in private station; and finally from two judgments in two different circuits of the United States, which were in like conflict, and under which, in a suit between the same parties, the harmonious operation of the Federal Courts was made the witness of a Marshal of one District turning out of possession the tenants who had lately been put in by the Marshal of another! It would unnecessarily incumber this preliminary history of the case to record the various Presidential recommendations, the reports of committees, the opinions of District Attorneys, Solicitors of the Treasury and Attorneys General of the United States, the Congressional Debates, and the various abortive agreements entered into by the Departments with a view to settle the question. It would be the history of litigation and claim diligently pursued for three and thirty years; and which at last, by opinions and agreements, verdicts and legislation, had knotted and tied itself into such a complication of tangles, that it seemed past the possibility of any ordinary process of justice ever to unfold and draw it straight. And when it was remembered that opinions of directly opposite conclusion on the title, had been given by Messrs. Rodney and Geo. Read of Delaware, by Messrs. Richard Stockton, M'Ilvaine, Southard, G. D. Wall and J. S. Green of New Jersey, by Mr. Willis Hall of New York, by Messrs. Penrose and Gilpin, Solicitors of the Treasury, and finally by Messrs. B. F. Butler and Légaré, Attorneys General of the United States, it was not wonderful that both Congress and claimant should nearly give over in despair, all hopes of coming to any satisfactory conclusion; that the

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petitioner should have been weary of invoking the attention of Congress, and that Congress should have been impatient in listening to the prayers of the petitioner! OCT. & NOV. 1847.

In this state of long protracted litigation and treaty, on the 8th of August 1846, when the Oregon Boundary had lately been giving to our relations with Great Britain a menacing aspect, Congress passed an act authorizing the President of the United States "to take such steps as *he may deem advisable for adjusting the title to the Pea Patch Island.*" In pursuance of this authority, communications were had between the President, in behalf of the United States, and the Hon. John H. Eaton, counsel of the New Jersey claimant, by which it was agreed to submit the question of the title to the arbitration of some professional gentleman, in whose ability, learning and honour both parties should have such implicit confidence, as to be willing to accept, as final and conclusive, whatever award he might make upon the question. Mr. Eaton having nominated to the President four gentlemen of this character from the District of Columbia, the States of Maryland, Pennsylvania, and New York, President Polk made choice of the Honourable JOHN SERGEANT of Pennsylvania, one of the persons named; a selection which was at once responded to by the other side as eminently acceptable. Accordingly on the 27th February 1847, articles of agreement under seal were concluded between the Hon. W. L. Marcy, Secretary of War of the United States, acting with the approbation of the President of the United States, of the one part, and James Humphrey, in whom Dr. STATEMENT.

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Gale's title had became vested, of the other, by which they mutually appointed JOHN SERGEANT, Esquire, of Philadelphia SOLE ARBITRATOR, with full power and authority, at such times and places as he might appoint, to examine witnesses and receive evidence according to the rules of law and equity, and to decide the question of the title to the said Pea Patch Island, as derived by the United States from the State of Delaware and by the said James Humphrey, claiming through Henry Gale, deceased, from the State of New Jersey. His decision and award made in writing to be FINAL and CONCLUSIVE.

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The matter being one to which publick attention in Eastern Pennsylvania, in New Jersey and Delaware had long been directed, Mr. Sergeant readily complied with the wish, very generally existing, that the case should be heard publickly; and the County of Philadelphia having offered to the Arbitrator its principal judicial chamber, and the City of Philadelphia having likewise placed at his disposal the Hall in which Independence was declared, the case, which occupied twenty-one days in the trial, was heard partly in the former room and partly in the latter, to which it was found convenient after a certain time to adjourn. The United States, were represented by special counsel, to wit: The Honourable JOHN M. CLAYTON of Delaware, formerly Chief Justice of that State, and now its representative in the Senate of the United States, and by JAMES A. BAYARD, Esq. of the same State, formerly District Attorney of Delaware, for the United States. Mr. James Humphrey was represented by the Honourable GEORGE M. BIBB of Kentucky, successively a Judge,

Chief Justice and Chancellor of that State, also, at one time, its representative in the Senate of the United States, and more lately the Secretary of the Treasury of the United States under President Tyler: and by the Honourable JOHN H. EATON, of Tennessee, Secretary at War under President Jackson, and subsequently Minister Plenipotentiary of the United States at the Court of Spain. The case was learnedly and deliberately argued on both sides; and Mr. Sergeant, after taking several weeks consideration of it, having delivered a written opinion setting forth very fully the grounds of his award, it has been thought worth while thus to preserve some record of the proceeding. Of the value of the Opinion, the Reporter cannot speak more appropriately than in language which he finds in a contemporaneous publication: "Mr. Sergeant's opinion it is true," said one of the Journals of Philadelphia,* in speaking of its delivery, "is not the judgment of a Supreme Court, and therefore is not authority in the *technical* sense of that word; but as the well reasoned opinion of a very able lawyer—whose greater distinction in his profession has made him unsolicitous about judicial station—and as having been formed after full and grave publick argument before him for many days together by other very able lawyers, it is far more authoritative than any opinion merely professional, and has all the *intrinsick* weight of the highest judicial opinion. It can scarcely be reversed in any case which may again involve the question of this boundary, and will take its place, of course, among the most enduring historical monuments of the States of New Jersey and Delaware.

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* The North American and United States Gazette of January 17, 1848.

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The case as it appeared on both sides was as follows:

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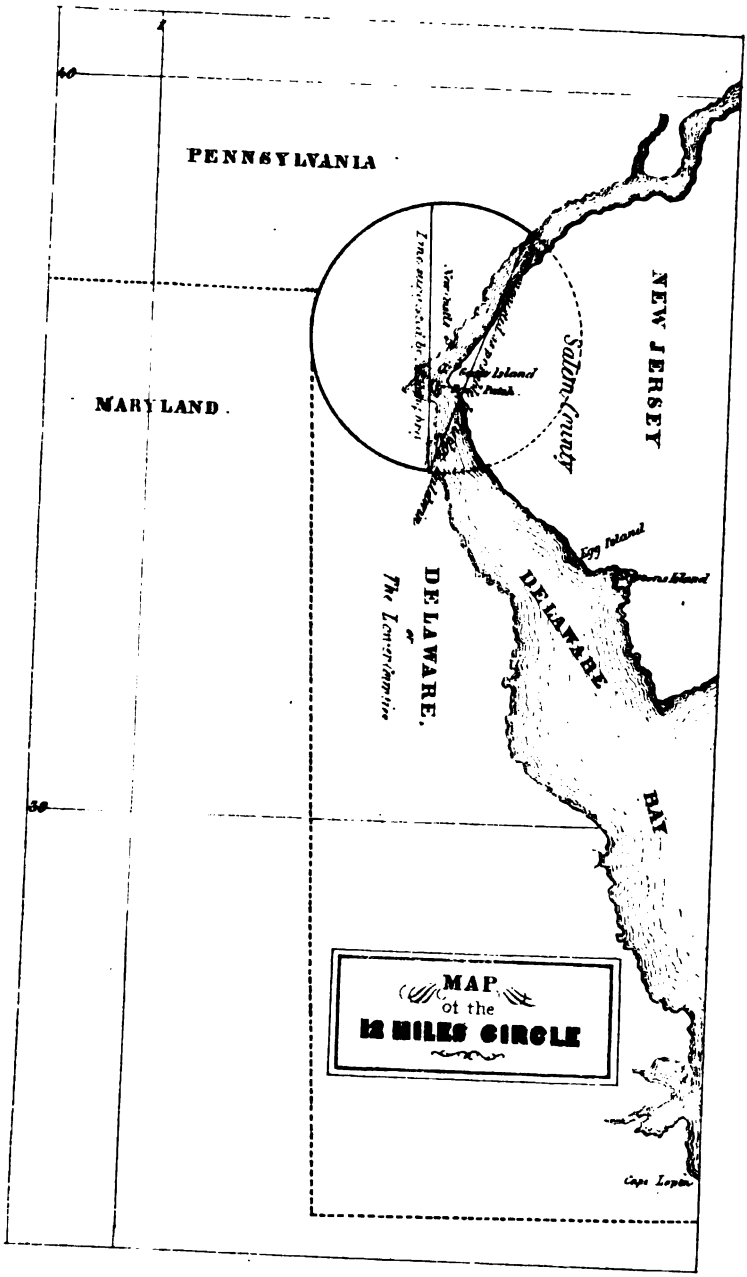
Title of Mr. Humphrey. On the 12th March 1663–4, England being at that time at war with the Dutch, Charles II. by letters patent, granted in fee to his brother James, Duke of York, all that part of the main land of New England, beginning at St. Croix next adjoining New Scotland in America, &c. &c: and also all that Island called Matowacks or Long Island, situate to the west of Cape Cod and the narrow higansetts, abutting upon the main land between the two rivers called Connecticut and Hudson rivers, "*together also with the said river called Hudson's river*, and all the lands from the west side of the Connecticut *to the east side of Delaware bay:*" with certain islands, and with all the lands, islands, soils, *rivers*, harbours, mines, minerals, quarries, woods, marshes, *waters*, lakes, *fishings*, &c. and all other *royalties*, profits, commodities and hereditaments *to the said islands, lands* and *premises* belonging and appertaining, with their and every of their appurtenances, and all *our* estate, &c. of, in and to the said lands and premises or any part or parcel thereof: with powers of government in extenso, and to exercise them, "not only within the precincts of the said territories and islands, but also *upon the seas in going and coming to and from the same*," as the Duke and his assigns, &c. should think "for the good of the Adventurers and Inhabitants there:" with further power to admit any persons "*to trade and traffique unto and within the said territories* and islands," and to encounter, expulse, repel and resist by force of arms, "*as well by sea as by land*," all persons who without the Duke's

The New Jersey Title.

Lets. Pat. Charles II. to the Duke of York. March 12, 1663-4.


40
PENNSYLVANIA
NEW JERSEY
MARYLAND
Salem County
DELAWARE
DELAWARE
BAY
MAP
of the
12 MILES CIRCLE

leave, "should attempt to inhabit within the several *precincts and limits* of our said territories and islands."* Oct. & Nov. 1847.

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The object of this grant was to enable the Duke to dispossess the Dutch, who were then in possession of much of New York, New Jersey and Delaware, under the name of New Netherlands. The New Jersey Title.

* Learning & Spicer's Laws of New Jersey, 3-8.

The Duke of York on the 23d and 24th June 1664, reciting the king's grant to him, conveyed to Lord Berkeley and Sir Geo. Carteret the territory now known as New Jersey, describing it as bounded on the east, part by the main sea, and part by Hudson's river, "*and hath upon the west, Delaware bay or river:*" with all *rivers, fishings*, &c. and all other *royalties*, &c. *to the said lands and premises* belonging or in any wise appertaining, as fully as the Duke himself had them.† Deeds from Duke of York to Berkeley and Carteret. June 23 and 24, 1664.

The object of this deed was the colonization of New Jersey, and under it Berkeley and Carteret entered and colonized that State accordingly. † Id. 8-11.

It is unnecessary here to recite the various mesne conveyances and undisputed early historical facts through which Mr. Humphrey formally deduced his title: or to state more than that on the 7th November 1743, the proprietors of West Jersey—in which portion of the State the Pea Patch Island was admitted to be, if in any—directed their surveyor to survey, &c. "600 acres of unappropriated *land*," any where in that division, and, on the 7th August 1782, to survey 5000 acres of like *land*, in the same division: and that two persons named Hall, having acquired 126 acres of the warrant of 1782, and 52$\frac{1}{2}\frac{1}{7}$ Proprietors' Grant of Pea Patch. Oct. 27, 1784.

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acres of that of 1743, caused a survey to be made on the 8th October 1784, on an "*island*," as appeared by the return of survey, "called the Pea Patch, situate in the County of Salem, about one mile west from Finn's Point, in Penn's Neck, and is about west of the mouth of Salem creek, a little above Reedy Point: also nearly south-east and by east from Hamburgh, about two and a half miles and about south half a point west from the Tile house at New Castle; *containing one hundred and seventy-eight acres* of marsh land, bank and mud flats and allowance for roads." This survey was returned on the 27th of the same month, and being approved by the council of proprietors, was recorded accordingly. *At the date of this survey the Pea Patch was just visible at low water, "about the size of a man's hat." As the tide rose it was covered by water, and even in* 1815, *when the Government of the United States took possession of it and embanked it, it was not unfrequently under water at high tide.* In February 1813, the title of the Halls was vested in Dr. Gale, through whom Mr. Humphrey claimed by a regular chain. On the 24th November 1831, the Pea Patch, having become, in the mean time, by alluvion, deposit and embankment, *a large island, and entirely above the point to which the tide rises even in its highest elevation*, the State of New Jersey passed an act of Assembly, "vesting in Henry Gale, his heirs and assigns, *all the right and title of the State of New Jersey* of, in and to an island called the Pea Patch, situate in the river Delaware, *in the County of Salem, and State of New Jersey.*" The act, after reciting that "it hath been *suggested* that the State of New Jersey hath *some* title" to the is-

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The New Jersey Title.

New Jersey gives its title to Dr. Gale. Nov. 24, 1831.

land, and that by reason thereof doubts have arisen concerning the title of the said Henry Gale, enacts that "all the right and title *of the said State of New Jersey* to the said island called the Pea Patch, situate in the river Delaware, in the Township of Lower Penn's Neck, *in the County of Salem, in the State of New Jersey*," &c. as mentioned in the original survey of the island, be granted and conveyed to the said H. G. his heirs and assigns, and be vested in him and them "in *as* full and ample a manner *as the State of New Jersey hath right and title to grant and convey the same*," reserving jurisdiction and sovereignty, &c.*

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The New Jersey Title.

* 2 Harrison's Laws of New Jersey, 366.

In order to show that the deeds from the King and Duke had always been considered and acted upon from early times as not limiting the State of New Jersey to low water-mark in the Delaware bay and river, or at any rate that the State had never been so bounded *de facto*, Mr. Humphrey's counsel adduced several statutes and publick facts and records of that State, as follows:

Exercise of Jurisdiction by New Jersey over the river. March 3, 1676.

March 3d, 1676, the proprietaries of West New Jersey—William Penn himself being one of them—by certain articles of concession and agreement, which constituted a sort of charter or fundamental law, grant convenient portions of lands for *wharves, keys* and *harbours:* and that all lands laid out for the said purposes shall be exempt from taxes: and that the inhabitants of the province have free passage through or by *any* seas, bounds, creeks, rivers, rivulets *in* the said province, *through or by which* they must necessarily pass to come from the main ocean to any part of the province aforesaid. And, further, that all the

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inhabitants within the said province have liberty of fishing in Delaware river.*

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In 1679 and 1680, Sir Edmund Andros, the Governor for the Duke of York, of the Colony of New York, which had been conveyed (inter alia with New Jersey) to the Duke, by King Charles II. imposed a duty of ten per cent. upon all European goods imported into the Delaware, which was collected at the Hoar kills, or Lewistown, as it is now called. *But it was discontinued at the instance of the proprietors of New Jersey*, who, in their remonstrance, insist that they have a *right to land any where in the Delaware bay*, as the bounds of the country they bought; that the *right of colonizing* was part of their bargain; that they bought the soil and right of government together; and that the powers of government limited them to erect no polity contrary to the laws of England; and that, with this restriction, they had the right of making laws for the good of the *adventurer* and *planter;* that if the Duke claims it by the *jus regale*, that power over the territory constituting New Jersey is vested in his *alienees.**

The New Jersey Title.

In 1679 or 1680, New Jersey resists a river duty.

* Leaming & Spicer's Laws of New Jersey, 390; also to the same effect, 409.

* Smith's History of New Jersey, 116.

In 1682, the Legislature of New Jersey resolved that the land and government of West New Jersey were purchased together.†

† Id. 163.

On the 3d October 1693, the Assembly of West New Jersey passed an act reciting that the whalery in Delaware bay has been in so great a measure invaded by strangers and foreigners, that the greatest part of the oil, &c. got by that employ, *has been exported out of the Province*, &c.; and enacting that

In 1693, speaks of Delaware bay as within the State.

all persons not residing within the precincts of this Province, or within the Province of Pennsylvania, who shall kill or bring on shore any whale or whales "*within Delaware bay or elsewhere within the boundaries of this Government*," shall pay one-tenth of the *oil*, &c. to the Governour, &c.*

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The New Jersey Title.

In 1701 or 2, the proprietors of East New Jersey, treating with the Lords of the Council of Trade and Foreign Plantations about a surrender to the Crown, of the powers of government of the State, which was then contemplated, request the King to confirm to them certain rights and privileges, among which is that of having all "*wrecks and royal fish* that shall be forfeited, found or taken within East New Jersey or by the inhabitants thereof, within the seas adjacent,"† *as they had the same under a then existing grant.* Though the answer of the Commissioners does not give them a fully satisfactory answer, it does not deny that these rights and privileges were then lawfully enjoyed by the proprietors.‡

*Leaming & Spicer's Laws of New Jersey, 519.

In 1701-2, East New Jersey claims right to wrecks and royal fish.

† Id. 588, 590, 591.

‡ Id. 596.

On the 23d August, 1725, the Legislature of New Jersey passed a revenue act, laying taxes upon eight different ferries along the Delaware river, from Trenton to Gloucester across to the other shore: and for the effectual compelling of the said boats, flats or wherries *belonging to the neighbouring colonies* to pay such taxes as aforesaid, it enacts that "all boats, flats or wherries, that carry goods or passengers for hire as aforesaid, that shall not first pay unto the collector of his Majesty's customs, &c. and get a certificate that he has paid the tax aforesaid, shall forfeit for every offence," &c.*

Lays taxes on ferry-boats. 23d Aug. 1725.

* Wm. Bradford's Laws of New Jersey, 1717, pp. 129-30.

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The New Jersey Title

In 1765, the State passes an act to regulate the Delaware fisheries

§ Allinson's Laws of New Jersey, 279, 313 and 367.

In 1765, the Legislature of New Jersey passed "an act to regulate the method of taking fish in the river Delaware, and to prevent obstructions in the navigation thereof, and for other purposes therein mentioned." This act, which was limited to five years, and was to be dependant for its force upon the passage of a similar act by *Pennsylvania*, was revived conditionally, with a supplement to it passed in 1768, in the year 1771.§ Pennsylvania did not pass any similar act, and the act of New Jersey not having become operative, nothing beyond its title is given in the volume referred to.

† Id. 347.

Declares the Delaware a highway. 21st Dec. 1771.

On the 21st December 1771, the same Legislature passed "an act declaring the river Delaware *a common highway*, and for improving the navigation *in the said river*."† It recites that the improving the navigation on rivers is of great importance to trade and commerce; that the river Delaware may be rendered much more navigable than it now is; that many persons, desirous to promote the publick welfare, had subscribed large sums of money for the purpose aforesaid, and that it was represented others will do the same if commissioners are appointed to receive subscriptions. It then enacts "that the river Delaware shall be and it hereby is declared to be *a common highway for the purposes of navigation* up and down the same." It then appoints commissioners to collect subscriptions, and "so much of the said moneys as may be necessary for that purpose, to lay out and apply for, and towards improving the navigation in the said river Delaware, *from the lower part of the falls near Trenton, to the river Lehigh at Easton:* and the residue thereof to lay out

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The New Jersey Title.

and apply for and towards improving the navigation in *that part* of the said river, *above the said river Lehigh.*" It next enacts, § 3, that the Commissioners, &c. shall have "full power and authority to *clear, scour, open, enlarge, straighten, or deepen the said river, wherever it shall to them appear useful for improving the channels; and also to remove any obstructions whatsoever, either natural or artificial, which may or can in any manner hinder or impede the navigation in the said river:* and to make and set up *in the said river any dams*, pens for water-locks, *or any other works whatsoever*, and the same to alter and repair as they shall think fit: and also to appoint, set out and make *near the said river, paths or ways*, which shall be free and open for all persons having occasion to use the same *for towing, hauling or drawing* any vessels, boats, small craft and rafts of any kind whatsoever; and *from time to time to do and execute every other matter or thing necessary or convenient for improving the navigation in the said river.*" It afterwards, § 5, "makes it penal to hinder the Commissioners or to obstruct the navigation of the river:" and, by § 6, that "every offence committed *in or on the said river*, against this act, shall be laid to be committed, and may be tried and determined as aforesaid in *any of the counties opposite to or joining* on that part of the said river, on which such offence shall be committed."

Declares the Delaware a highway. 21st Dec. 1771.

On the 28th November 1822, the Legislature of New Jersey passed an act relative to certain of its boundaries, in which it was enacted that the west boundary of certain counties, including *Salem* County, *in which the Pea Patch was said to be*, should be "the main ship channel of the river Delaware."*

* 2 Harrison's Laws of New Jersey, 39, § 4.

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On the other hand, there were certain publick acts of New Jersey which looked as if the State had considered that its west boundary came but *to* low water mark in the river.

The New Jersey Title.

Thus, in 1674 and in 1680, New Jersey having been conquered by the Dutch since the deeds of the Duke of York, 23d and 24th June 1664, and restored again to England—the Duke, by two new deeds, made after a regrant by the crown to him, and with a view, it is probable, to prevent any question of title, regrants the same territory previously granted, describing it on its west boundary, not as in the former deed, as "having on the west, Delaware river," but, in one deed, as extending "*along*," and, in another, as running "*up*" the Delaware.*

July 29th, 1674, and Aug. 6th, 1680, west boundary described as up, and along the Delaware.

* Leaming & Spicer's Laws of New Jersey, 47 and 414.

So in February 1681, the Commissioners for settling and regulating lands in West Jersey agree, with the approbation of the Governour and Council, that the surveyor shall measure the front of the river Delaware, beginning at Assispink creek, (a creek which empties into the Delaware at Trenton,) and "from thence down to Cape May," and that every ten proprietors shall have their proportion of front "*to* the river."†

Feb. 1681, fronts of each 10 proprietaries to come to Delaware river.

† Id. 436.

So in July 1683, the Assembly of West Jersey enact that the proprietary of the Province of Pennsylvania be treated with in reference to the rights and privileges of this Province "*to or in* the river Delaware."‡

July 1683, Proprietary of Penna. to be treated about rights of New Jersey in or to the Delaware.

‡ Id. 480.

So on the 21st January 1709, the General Assembly of New Jersey passed "an act for dividing

and *ascertaining the boundaries of all the counties* in this province;" which recites that by the uncertainty of the boundaries of the counties of the province, great inconveniences have arisen, so that the respective officers of most of those counties cannot know the limits of them: For preventing which in time to come, and the *better ascertaining the boundaries*, it enacts, &c. (after having settled the boundaries of other counties as running "*to*" or "*by*" or "*up*" or "*down*" the Delaware bay or river,) that *Salem* County begins "at the *mouth*" of a certain creek which empties into Delaware bay. The act then carries the boundary round by that creek and certain lines "*to* Delaware river, then *down* Delaware river and bay to the place of beginning"* It is to be remarked, however, that where counties are divided by creeks or rivers, this act frequently brings the boundaries of such counties only *to* those creeks or rivers on both sides, without extending the boundary *into* the stream: so that many of those creeks and rivers were left beyond any county jurisdiction whatever, until that matter was changed by an act of March 7, 1797, "declaring the jurisdiction of the several counties in this State, which are divided by rivers, creeks, bays, highways or roads."†

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Jan. 1709, State defines its west boundary as coming to the river.

* Statutes of New Jersey revised and published under the authority of the Legislature. Trenton: Printed by Phillips & Boswell, 1847, p. 161.

† Id. 180.

In 1783, makes an equal division of the river and islands with Pennsylvania.

On the 26th April 1783, commissioners having been appointed by Pennsylvania, for the purpose of settling the jurisdiction of the river Delaware and islands within the same, New Jersey made an agreement, regulating the jurisdiction, &c. and treating the rights of the two States in the river as about equal, down to the upper portion of the twelve miles circle; which agreement was soon after ratified‡ by

‡ By New Jersey, May 27, 1783: By Pennsylvania, September 20, 1783. Id. 44.

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these two States and has regulated the matter ever since.

Statement.

The Delaware Title.

Title of the United States. At the date of the letters patent of March 12th, 1663–4, already mentioned, from Charles II. to the Duke of York, the Dutch were in actual possession of New York, a portion of New Jersey and much of both sides, and particularly of the west side of Delaware bay and river; all which they held under the name of New Netherlands. To put the Duke of York in possession of his newly acquired estates, an English fleet was sent out under the command of Col. Richard Nicolls, who styles himself "principal commissioner for *his Majesty* in New England, Governour General under *his Royal Highness*, James Duke of York and Albany, &c. of all *his* territories in America and commander in chief of all the forces *employed by his Majesty to reduce the Dutch nation and all their usurped lands and plantations under his Majesty's obedience.*"* The Dutch surrendered New York, August 1664, and within a week afterwards Col. Nicolls sent Sir Robert Carre round into Delaware bay and river, to dispossess the Dutch there † This Dutch settlement appears to have been an *appendage to the government of New York*, or Manhattans, as it was then called, from which it originally sprung, and to which, as a superintending and protecting power, it appears to have constantly referred. Thus the original Dutch purchase of Delaware from the Indians in June 1620, was concluded by the Indians in person *at New York*, and recorded there.‡ So

Some evidence of the Duke of York's title on the 24th August 1682.

* A. D. 1667; 4 Hazzard's Penn. Reg. 74. Several of the documents of which evidence was given on the trial, are found in this valuable Repository; but more legal evidence of them was given before the Arbitrator. Ancient records were produced, being the identical ones apparently, which were given in evidence before Lord Hardwicke in 1750, on the hearing of Penns v. Ld. Baltimore, 1 Vesey. 444.

† 1 Id. 37.

‡ 4 Id. 82.

when the Swedes began to build a fort on the Delaware, about the year 1638, the Director General of the New Netherlands, *resident at New York*, and appointed by the States General, advertises the Swedish commander, that the "whole South river has been many years in *our* possession, and above and below settled by *our* forts and also sealed by *our* blood."* So in 1646, the Director General and his council under the States General, allowed certain persons to settle upon the South river, on condition that they acknowledge the Director and his council "*for their lords and patrons*," and submit to all taxes which they have laid or may lay.† And there was produced before the arbitrator, ancient records of five *Dutch patents for lands in Delaware, emanating from Governour Stuyvesant at New York*, between the years 1664 and 1665, and recorded there,‡ which titles, Mr. Clayton informed the arbitrator, are recognized as valid in Delaware up to this day. Other Dutch records from New York shewed that in 1665, instructions were issued from the Director General there, "for the Vice Director in the South river and the commissioners joined with them," in which minute directions are given as to the places in which *lands are to be granted* and streets laid out there.§ with various other instructions shewing that that district had *a very close and depending relation upon the government at New York as a principal.*

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*4 Hazzard's Penn. Reg. 82.

Some evidence of the Duke of York's title on the 24th August 1682.

† 4 Id. 119.

‡ Id. 119-20.

§ Id. 82.

In this condition of things, the Delaware country apparently stood in regard to the Dutch Government at New York, when the latter surrendered to the English: And with the surrender of the principal government at New York, Sir Robert Carre had no

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difficulty, on the 1st October 1664, in procuring a surrender of the settlement on the Delaware.

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New York continued to be, under the English, as it had been under the Dutch, the seat of principal government; the English Governours there, acting under a sort of double or mixed authority derived *partly from the King and partly from the Duke of York.* A variety of commissions and other publick documents, for example, were produced from Col. Nicolls, and other English governours there, granting lands in Delaware, constituting justices there, *appointing collectors of customs,* and doing various publick acts not necessary to be stated. In eight of them, *including several grants of land,** there was no recital of the authority under which the act professed to be done. In ten others, being most of them commissions to judicial office, there was a reference to "*his Majesty's service,*" or to power derived from "*his Majesty;*" the act being sometimes done in "*his Majesty's* name." In eleven others—*including a grant of land,* of which however the rent was reserved to the *King*—the power under which the act was done professed to be derived from *the Duke of York.* Two others recited a joint or double authority; being "by virtue of his Majesty's letters patent, AND the commission and authority given unto me by his Royal Highness." And a third one, a proclamation by Governour Andross, one of the British governours—on the re-conquest of New York from the Dutch—went as follows: "Whereas, it hath pleased *his Majesty and his Royal Highness,* to send me with authority to receive this place and government, and to continue in command thereof

The Delaware Title

Some evidence of the Duke of York's title on the 24th August 1682.

* In the Breviate, p. 42. mentioned *post*, there is a very long list of grants of land in Delaware, made by the English governours. These were referred to generally by the U. S. but they are imperfect abstracts of the patents, and not material to be here copied.

under *his Royal Highness, who* hath given me his command for securing the rights and properties of the inhabitants, and that I should endeavour by all fitting means the good and welfare of *this province and dependencies under his government*, &c."* So again, when the Delaware country surrendered to Sir Robert Carre, Oct 1st, 1664, protection was to be afforded to all who "shall take the oath of allegiance *to his Majesty:*" While in directions from Gov. Nicolls and his council at New York, in 1668, "for the better settlement of the Government on the Delaware," the newly appointed counsellors are to take the oaths to *his Royal Highness; whose* laws as established *by him*, are ordered to be shewed and frequenly communicated to them, the said councellors, and others."† A fact is also mentioned by the Arbitrator in his opinion,‡ as illustrative of some title in the Duke, to wit, that *after* Mr. Penn, March 4th, 1680–1, had obtained letters patent *from Charles II.* for the Province of Pennsylvania, *he took a release*, August 21st 1682, *from the Duke of York for the same premises.*

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* 4 Hazzard's Penn. Reg. 55, 56, 57, 73, 74, 75, 81, 82.

† Id. 37-38.

‡ *Post.*

But notwithstanding the great research of the counsel of the United States, aided by several other persons connected with Historical Societies and curious in Archæology—whom the interest of the case had induced to study it—nothing precise was shewn as to the source from which the Duke claimed to derive the power which it was in evidence that he actually exercised over the district now known as Delaware. Whether the Duke was under the same mistake as Lord Baltimore, who, as late as 1737, in his answer to the bill of *Penns* v. *Baltimore*, swears

Suggestions as to source of the Duke's title, 24th Aug. 1682.

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that country is "on the *east* side" of the bay; which would have brought it *strictly* within the terms of the King's patent of March 12th, 1663–4: Whether—taken in connection with the known *object* of the grant, which was the dispossession of the Dutch from all this region—he supposed that it passed under the clause of the patent, which gave him power to encounter and *expulse*, as well by sea as by land, any persons who should attempt to "inhabit within the several *precincts* and limits" of the territories granted with full appurtenances and with power to govern them: Whether he thought that the Dutch settlement on the Delaware, having been at all times, and at the very date of the conquest of New York, a part, "appendix," and dependancy of that latter place, necessarily followed its course and fortune, and so passed into his hands by the terms of his patent, which gave him New York, *and all powers of government over the country conveyed and all its appurtenances:* Whether there might have been something, in some commission, or some instructions from the King to the English commander, which two centuries now rose up to hide from view, and by which a title by conquest might have enured to the Duke and not to the crown: Whether the Duke considered that he had *no* title in law, and took possession only as a successful conqueror, meaning to procure or make at some future time, a confirmation of what he did: Or whether, finally, he exercised the more usual privilege of royal and noble blood, and did not undergo the fatigue of thinking any thing about the subject:—This was all matter on which speculation might exercise its ingenuity, but

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on which the case itself exhibited no direct evidence.* Oct. & Nov. 1847.

However, possessing either a good title, an imperfect one, or no title at all, the Duke of York did, on the 24th of August 1682, by a deed of feoffment with livery of seizin, convey to William Penn, in fee, "all that the town of New Castle, otherwise called Delaware, *and all that tract of land lying within the compass or circle of twelve miles about the same, situate, lying and being upon the river Delaware, in America; and all the islands in the said river Delaware, and the said river and soil thereof, lying north of the southernmost part of the said circle* of twelve miles about the said town, together with all rents, services, royalties, franchises, duties, jurisdic-

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The Duke of York grants to Wm. Penn, August 24th 1682, the twelve miles circle.

Including river, subaqueous soil and islands.

* It would appear probable that no very precise notion was had by the Duke himself or his Governours, perhaps, as to the nature and extent of his right here: but Sir John Werden, his intelligent secretary, seems to have regarded it as a sort of *pre-emption* right rather than as a perfect title. When Mr. Penn was applying for a grant of Pennsylvania, the Board of Trade on the 14th June 1680, refer his petition, before acting on it, to Sir John Werden, to know whether such a grant as Mr. Penn wanted, "would any way intrench upon the patent of his Royal Highness or otherwise prejudice the same." Sir John replies: "By all which I can observe of the boundaries mentioned in Mr. Penn's petition, they agree well enough with that colony or plantation which hath been hitherto (ever since the conquest of New York by Col. Nicolls,) *held as an appendix and part of the government of New York*, by the name of Delaware Colony, or more particularly New Castle Colony, that being the name of a principal place in it; the whole being planted promiscuously by Swedes, Finlanders, Dutch, and English; all which hath been actually under the government of his Royal Highness' Lieutenants at New York hitherto. But what are its proper boundaries, (those of latitude and longitude being very little known, or so ill observed, as experience tells us in all the West Indies,) I am not able to say. If this be what Mr. Penn would have, I presume the Right Honourable the Lords of the Committee for Trade and Plantations, will not encourage his pretensions to it, because of what is mentioned, which plainly shew the Duke's right *preferable to all others (under his Majesty's good liking) though it should not prove to be strictly within the limits of the Duke's patent*; but if it be, &c. &c." (Letter of June 23rd 1680. 1 Hazzard's Pennsylvania Register, 274.)

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tions," &c. &c. and all the estates, &c. "to have and to hold the said town and circle of twelve miles of land about the same, *islands, and all other the before mentioned*," &c. &c. The Duke for himself, his heirs and assigns, then covenants and grants with and to Penn, his heirs and assigns, that he or they will, any time within seven years from the date of the deed, "*do, make, execute or cause to be made, done, executed, all and every such further act and acts, conveyances and assurances in the law whatsoever, for the further conveying and assuring* the said town and circle of twelve miles of land about the same, *and islands and all other the premises with the appurtenances*" to Penn in fee: after which he constitutes John Moll and Ephraim Herman, "jointly and either of them severally," his attorneys, and so gives them full powers for him and in his name and stead to enter into the premises granted, and every part of them, and to take quiet and peaceable possession or seizin of them, or any part or parcel in the name of the whole: And after taking such quiet and peaceable possession and seizin, to deliver the same to William Penn, his heirs and assigns, or to his and their lawful attorney. Ratifying, approving, &c.*

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Covenants for further assurance.

Moll and Herman attorneys to deliver seizin to Penn.

Entered in the Secretary's office, New York, Nov. 21st 1682.

The Duke of York grants to Wm. Penn, August 24th, the land south of the circle.

The Duke, on the same day, by a second deed of feoffment with livery of seizin, conveyed to William Penn, in fee, "*all that tract of land upon Delaware river and bay*, beginning twelve miles south from the

* There were produced two original *leases* for 10,000 years from the Duke to Wm. Penn, his executors, &c. one dated Aug. 21st, 1682, but not sealed or delivered in the presence of witnesses; another just like it only sealed and delivered, and dated three days after it, Aug. 24th, 1682. The descriptions in both were the same as in the deed of feoffment. There was also a similar lease, 24th August 1682, for the country south of the circle.

town of New Castle, otherwise called Delaware, and extending south to the Hoar kills, otherwise called Cape Henlopen, together with free and undisturbed *use and passage into and out of all harbours, bays, waters, rivers, isles and inlets, belonging to or leading to the same;* together with the soil, fields, woods, underwoods, mountains, hills, fens, isles, lakes, *rivers,* rivulets, bays and inlets *situate in, or belonging unto the limits and bounds aforesaid,* together with all sorts of minerals, and all the estate, interest, royalties, franchises, powers, privileges and immunities whatsoever of his said Royal Highness therein or in or unto any part or parcel thereof." Then there was a covenant *for further assurance,* and an appointment of Moll and Herman to be attorneys to deliver possession and seizin to Penn exactly as in the former deed.

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The Delaware Title.

The Duke of York grants to Wm. Penn, August 24th, the land south of the circle.

Entered in the Secretary's office New York, Nov. 21st 1682.

It further appeared from an ancient record in the Rolls Office at Philadelphia, made 28th August 1701, that on the 28th of October 1682, as they certify under their hands and seals, Arnoldus de La Grange and eleven other persons, "being inhabitants of the town of New Castle upon Delaware river, having heard the Indenture read, made between his Royal Highness, James Duke of York and Albany, &c. and William Penn, Esq. Governour and Proprietor of the Province of Pennsylvania, &c. wherein the said Duke transferreth his right and title to New Castle and twelve miles circle about the same, with all powers and jurisdictions and services thereunto belonging unto the said William Penn, and having seen by the said Duke's appointed attorneys, John Moll and Ephraim Herman, both of New Castle,

Oath of Allegiance of the people of New Castle to William Penn, October 28th 1682.

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possession given, and by our Governour William Penn, Esq. possession taken, whereby we," says the record, "are made subjects under the King to the said William Penn, Esq: We do hereby, in the presence of God, solemnly promise to yield him all just obedience, and to live quietly and peaceably under his government."

It appeared further from an ancient record, made at the same time, in the same office, that the same Arnoldus de La Grange and eight other persons made a MEMORANDUM under their hands, October 28th 1682, that on that day and year "William Penn, Esq. by virtue of an instrument of indenture, signed and sealed by his Royal Highness, James Duke of York, &c. did then and there demand possession and seizin of John Moll, Esq. and Ephraim Herman, Gentlemen, (attorneys constituted by his said Royal Highness) of the town of New Castle, otherwise called Delaware, with twelve miles circle or compass of the said town: that the possession and seizin was accordingly given by the said attorneys to the said William Penn, according to the usual form, by delivery of the fort of the said town, and leaving the said William Penn in quiet and peaceable possession thereof, and also by the delivery of turf and twig, and water and fowl* of the river Delaware, and that the said William Penn remained in the peaceable possession of the premises."

Memorandum, Oct. 28th 1682, by inhabitants of New Castle, as to seizin delivered on that day of twelve miles circle.

* Or soil?—Rep.

Next an ancient record, made at the same time and place, the original of which was made *in* Delaware river, under the hands of Luke Wattson and ten other persons, November 7th 1682, which, after

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reciting the Duke's deed to William Penn for the territory beginning twelve miles south from the town of New Castle, the power of attorney to Moll and Herman, and that Mr. Penn had substituted Captain William Markham, as attorney to receive seizin for him of that said tract, proceeds to testify and declare that livery of seizin was delivered of it also; that the persons whose names are subscribed to the document, on the day of the date thereof, "have been present and seen, that they the said John Moll and Ephraim Herman, in pursuance of his Royal Highness' command, and by virtue of the power given them by his said Royal Highness, James Duke of York and Albany, etc. by and in the above mentioned instrument of indenture, bearing date as above, have given and delivered actual possession unto the said Captain William Markham, to the sole use and behoof of the said William Penn, (of part in the name of the whole,) of the land, soil and premises in the said instrument of indenture mentioned, and according to the true intent and meaning of his said Royal Highness mentioned in the same."

Declaration, Nov. 7th 1682, by Wattson and others as to seizin delivered on that day of land south of twelve miles circle.

Next came another ancient record, without date, however, from the office for recording of deeds, &c. at New Castle, Delaware; being an account by John Moll, himself, one of the persons named in the Duke's deeds as attorneys for delivering seizin of both tracts to Mr. Penn, of the mode in which he did this duty. As this quaint document has not perhaps been in print, and may not be without interest to the historian, it is here inserted in the same form in which it was given in evidence.

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John Moll's certificate about seizin delivered.

"These are to certify all whom it may concern that William Penn Esqr. Proprietor and Govr. of the provinces of Pennsylvania and the Territories thereunto belonging at his first arrival from England by the Town of New Castle upon Dellaware River in the month of October anno 1682 did send then and there our messenger ashoar to give notice to the Commissioners of his desire to speak with them aboard (I being then left the first in Commission by Sr. Edmund Andross Governour Genl. under his Royal highness James Duke of York and Albany etc. of all his Territorys in america) did go aboard with some more of the commissioners att which time Esqr. Penn did show me two sundry Indentures or Deeds of Enfeoftment from under the hand and seal of his Royall Highness granted unto him, both bearing date the 28th day of August Anno 1682 the one for the County of New Castle with twelve miles distance North and South thereunto belonging and the other beginning twelve miles below New Castle and extending South unto Cape henlopen together with the mills and waters of the said River, Bay, Rivulets and the Islands thereunto belonging &c. underneath both which sd. Indentures of deeds of Infeoftment were added his Royall highness letters of attorney directed unto me and Ephraim Herman deceased with full power and authority for to give in his Royall hignesses name unto the sd. William Penn Esqr quiet and peaceable possession of all what was Inserted in the sd. Indentures as above briefly is specified. But the sd. Eph. Herman happened to be gone from home so that he was not at that time aboard with me of the sd. ship, I

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therefore did desire from Esqr Penn four and twenty hours consideration for to communicate with the sd Herman and the rest of the Commissioners about the premises. In which compass of time we did unanimously agree to comply with his Royal Highnesses orders whereupon by virtue of the power given unto us by the above mentioned letters of Attorney We did give and surrender in the name of his Royall Highness unto him the said William Penn Esq actual and peaceable possession of the fort of New Castle by giving him the key thereof to lock upon himself alone the door which being opened by him again We did deliver allso unto him one turf with a twigg upon it *a porringer with River water and Soyle* in part of all what was specified in the sd. Indenture or Deed of Infeoftment from his Royal Highness and according to the true intent and meaning thereof. And few days after that we went to the house of Capt. Edmund Caulwell at the south side of appoqueniming Creek by Computation above twelve miles distance from the Town of New Castle as being part of the two Lower Countys here above mentioned and specified in his Royal Highnesses other Indenture or Deed of Infeoftment and after we had shown unto the Commissioners of these Countys the power and orders given unto us as aforesaid we asked them if they could show us any cause why and wherefore we should not proceed to act and do there as we had done at New Castle, and finding no manner of obstruction We made then and there in his Royal Highnesses name the same manner and form of delivery as we had done at New Castle Which acting of us *was fully accepted and well approved off by Anthony Brockhold then Commander in chief and*

John Moll's certificate about seizin delivered.

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his Councill at New York as appears by their Declaration bearing date the 21st of November 1682, *from which Jurisdiction we had our Dependance all along ever since the Conquest* untill we had made the above related delivery unto Governour William Penn by virtue of his Royall highnesses orders and Commands &c. Jno. Moll.

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The Declaration of November 21st 1682, referred to in the foregoing certificate, was a circular letter* by Captain Brockhold, &c. to the several justices of the peace, magistrates and other officers of Delaware, which, after reciting the two deeds of August 24th from the Duke of York to William Penn,—mentioning one of them as granting "all that town of New Castle otherwise called Delaware, and all that tract of land lying within the compass or circle of twelve miles about the same, with all *islands and the river and soil thereof* lying north of the southernmost part of the said circle,"—which deeds are spoken of as having been "here produced and shewn to us, and *by us well approved* and entered in the publick records of this province;"—proceeds to say that "*we being fully satisfied of the said William Penn's right to the possession and enjoyment of the premises*, have therefore thought fit and necessary to signify and declare the same to you, to prevent any doubt or trouble that might arise or accrue, and to give you your thanks for your good services done in your several offices and stations during the time you remained under his Royal Highness' government. Expecting no further account than that you readily submit and yield all due obedience and

* 3 Hazzard's Penn. Reg. 34.

Approval of the Duke's grant by his government at New York, Nov. 21st 1682.

conformity to the powers granted to the said William Penn in and by the said indenture, in the performance and enjoyment of which we wish you all happiness."

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So far as to the title derived to Mr. Penn from the grants of 24th August 1682, prior to certain letters patent now to be mentioned, from King Charles II. not to Mr. Penn—*but to the Duke of York*—granting, March 22d 1683, to *him*, the same property which the Duke had granted about seven months before to Mr. Penn.* The letters patent describe the territory as "all that the town of New Castle otherwise called Delaware, and fort therein or thereunto belonging, situate, lying and being between Maryland and New Jersey, in America: And all that tract of land lying within the compass or circle of twelve miles about the said town, situate, lying and being upon the river of Delaware. *And all islands in the said river of Delaware. And the said river and soil thereof, lying north of the southernmost part of the said circle of twelve miles about the said town.* And all that tract of land upon Delaware river and bay, beginning twelve miles south from the said town of New Castle otherwise called Delaware, and extending south to Cape Lopin. Together with all the *lands, islands, soil, rivers, harbours,* mines, minerals, quarries, woods, marshes, waters, lakes, fishings, hawkings, huntings, and fowlings, and other *royalties,* privileges, profits, commodities and hereditaments *to the said town, fort,* tracts of land, islands and premises, or to any or either of them belonging or appertaining, with their and every of their appurtenances, situate, lying and being in America. And

The Delaware Title.

* 2 Hazzard's Penn. Reg. 27.

Letters Patent from Charles II. to the Duke of York, for Delaware, March 22d 1683.

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all our estate, right, title, interest, benefit, advantage, claim and demand whatsoever, of, in or to the *said town, fort, lands* or *premises*, or any part or parcel thereof: And the reversion and reversions, remainder and remainders thereof, together with the yearly and other rents, revenues and profits of the premises and of every part and parcel thereof. To have and to hold the said town of New Castle otherwise called Delaware, and fort, and *all and singular the said lands and premises, with their and every of their appurtenances hereby given and granted*, or hereinbefore mentioned *to be* given and granted, unto," &c.

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Letters Patent from Charles II. to the Duke of York, for Delaware, March 22d 1683.

These letters patent gave powers of government in the same way as those of March 12th 1683–4, to which, except in the description of the property granted, their language almost exactly conformed.

The original of this patent from the King to the Duke for Delaware*, and of the Duke of York's grant to Penn for the twelve miles circle *were produced before the arbitrator;* having both, with the original charter of Pennsylvania and two leases of August 24th to Mr. Penn, mentioned ante, p. xxxii. *n* been brought to Philadelphia, about the year 1834, by Mr. Coates of that city, an agent of the estates in Pennsylvania belonging to Mr. Penn's descendants in England. Mr. Coates got possession of them on a visit to his principals in England. Being at their seat of Stoke Pogis, he was shewn by them into the charter-room of their house, where he was told that he might find some old deeds &c. that would interest him as an American, and to which he was welcome. Happening to find the patents and

* Besides the original, there was, 1st. an exemplification from the Rolls in England under the great seal, 16th July, vi. Vic. 2d. a copy sworn to before the Lord Mayor of London, 4th Feb. 1735. 3d. a printed copy in The Pennsylvania Votes of Assembly, published in 1754 vol. 3, p. 590.

deeds just mentioned, he brought them to Philadelphia, where those relating to Delaware still were, on the hearing of this case. OCT. & NOV. 1847.

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It appeared also, by an original "Brevitat" of the Hon. Mr. Murray, A. G. and Sir Dudley Ryder, S. G. Solicitors for the sons of William Penn in their suit with Lord Baltimore,* that these identical parchment letters patent were in evidence before Lord Hardwicke in that case as *the complainants'* exhibit. And were put in evidence by them to shew *their* possession of them, and *so repel an objection of Lord Baltimore's, that "the Duke obtained this grant for himself and not for Mr. Penn, and never made any subsequent conveyance to Mr. Penn."*† The Delaware Title.

* 1 Vesey, Sr. 444, before Lord Hardwicke, A.D. 1750. The bill was filed June 21 1735.

† Breviate, 56.

The counsel of the United States, in order to shew that the title of the Penns as thus derived, had been subsequently recognized and confirmed by the crown, and had been asserted also by the State of Delaware just at the time of the American Revolution, then referred to certain facts of history as follows:

Penn was the intimate friend of James II. and in favour at the English court until the accession of William and Mary. In 1692 his government in America was taken from him, and Benjamin Fletcher appointed in his place. Fletcher gave dissatisfaction, and *Penn was restored to his government again, in* 1694, *by letters from William and Mary.*‡ Alleged confirmation of the Penn title by William and Mary, 1694.

‡ 1 Proud's History of Pennsylvania, 377, 403.

Charles I. having granted to Lord Baltimore in 1632, a tract of land between the Chesapeake and Delaware Bays, a dispute arose between Penn and him as to the extent of the King's grant and the si-

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tuation of the line between them. Lord Baltimore's grant, reciting that the Earl, being desirous to extend the Christian religion as well as the English empire to certain parts of America, *hitherto savage, and inhabited by people having no knowledge of the Divine Being*, had asked the King for *that* region—gave to him *all the country being between the Chesapeake and Delaware Bays*. An application having been made to the crown for a grant to the Duke of York, "of the parts adjacent to the Delaware Bay," Lord Baltimore, by his agent Mr. Burk, applied, May 21st 1683, praying that the grant might not pass until the King should be satisfied as to the extent of the grant already made to the Earl. The minute then proceeds:* May 30th 1683. "Counsel learned, in behalf of his Royal Highness, *together with an agent from Mr. Penn, who solicits the passing of this grant;* as also the petitioner, Mr. Burk, and his counsel learned, are called in: Whereupon the counsel for my Lord Baltimore, affirming that the tract of land in question, lies within the limits of the charter granted to the Lord Baltimore, and that his lordship has always continued his claim thereunto; *Mr. Penn's agent, and the counsel in behalf of his Royal Highness*, endeavoured to make out, that the territory was never possessed by my Lord Baltimore, but originally inhabited by Dutch and Swedes; and that the grant to my Lord Baltimore, was only of lands not inhabited by Christians; so that a surrender having been made to his Majesty in 1664, the Lord Baltimore can have no rightful claim thereunto; and that it having been ever since in the possession of his Royal Highness, the Lord Baltimore

*1 Votes of the Pennsylvania Assembly, xiv.

can receive no injury by the grant that is desired. Upon the whole matter, Mr. Penn's agent undertaking to prove within a short time, *that this country was possessed by the Dutch and Swedes, in the year 1609, or at least before the date of the Lord Baltimore's patent*, their lordships agreed to meet again as soon as the proofs shall be ready for making out the same." After numerous hearings, in which it appears that the *Duke of York*, the Earl and *Mr. Penn*, all took part, a final order was made November 7th 1685, as follows:* "My Lord Baltimore and *Mr Penn*, attending concerning the boundaries of the country of Delaware, are called in; and being heard, their lordships resolve to report their opinion to his Majesty, that, for avoiding of further differences, the tract of land lying between the river and bay of Delaware and the eastern sea on the one side, and Chesapeake bay on the other, be divided into two equal parts, by a line from the latitude of Cape Henlopen to the fortieth degree of northern latitude; and that one-half thereof lying towards the bay of Delaware, and the eastern sea, be adjudged *to belong to his Majesty*, and that the other half remain to the Lord Baltimore, as comprised within his charter."

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* 1 Votes of the Pennsylvania Assembly, xviii.

Alleged confirmation of the Penn title by James II. 1685.

This being done, articles of agreement were concluded in 1732, between the Earl of Baltimore and the sons of William Penn, upon which the *Penns*, in 1735, filed their bill in Chancery in England, praying for a specifick performance and the running and settlement of the boundaries. This bill set forth title in the Penns; the Duke of York's and the King's deeds, (giving their dates and the *description* of the property conveyed, including the

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river, soil, and islands north of the southernmost part of the twelve miles circle,) the delivery of seizin by Moll, the circular letter by Captain Brockhold, the covenant in the Duke's deed for further assurance, and alleged that "immediately after the said last recited letters patent had passed the great seal, the said Duke of York, *who was no other than a trustee for the said William Penn therein, and had obtained them in pursuance of his covenant for further assurance, did deliver over the same original last recited letters patent under the great seal to the plaintiff's father;*" that after this, and when the Duke was soliciting for the King a more beneficial grant for Penn, which was then preparing in order to pass the great seal, the same was stopt by Lord Baltimore, whose petition caused the matter to be referred by the King to the Committee of Trade and Plantations, where both parties were heard for nearly two years and a half: that *it is continually taken notice and expressly mentioned in the minutes made by the said committee thereon, that the dispute was a dispute between Baltimore and Penn*, though the latter did sometimes use the Duke of York's name, and though the Duke himself did by his counsel and other agents sometimes assist and interpose in the suit: which latter fact the Penns rely on as a manifest proof that the Duke held the King's letters patent, for the benefit of Penn and not of himself. And finally, that, November 7th 1685, the committee made the adjudication already mentioned.

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Bill in Chancery by the Penns, 1735.

That notwithstanding this, Lord Baltimore in Jan. 1708, brought the matter before Queen Anne, who, after a counter-representation from Penn, dismissed

Alleged confirmation of the Penn title by Queen Anne, 1709.

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the petition in the same month; that not yet satisfied, the Earl, in May 1709, presented the matter again to the Queen, who ordered it to be heard before her in council, where both Penn and Baltimore were heard, and where it was ordered that the Earl's petition be dismissed, and that the order of November 7th 1685, be ratified and confirmed in all its points and put in execution.

The case, which is the well known case reported in Vesey, Sr. under the name of *Penn vs. Lord Baltimore*,* was heard before Lord Hardwicke who, May 15th 1750, decreed in favour of the Penns, but "without prejudice to any prerogative, power, property, title or interest of his Majesty, his heirs and successors in or to the said territories, &c."† with liberty, in case the King should insist on any power, &c. for any of the parties to apply. Subsequent articles of 1760, and another Chancery decree, twelve years later, terminated the dispute between the parties.

* Vol. 1, p. 444.

Penn's title said to have been decreed good by Lord Hardwicke, 1750.

† Belt's Supplement to Vesey, Sr. 198.

In 1767, the Penns and Lord Baltimore presented a joint petition to George III. reciting the before mentioned articles and decrees, and setting forth that the commissioners to run the line were proceeding in their work, and praying the King to give his allowance, ratification and confirmation of the articles and decrees already mentioned; whereupon the King, January 11th 1769, by order in council, signified his approbation of the proceedings mentioned in the petition.

Alleged confirmation of the Penn title by George III. 1769.

On the 8th April 1775, John Penn, then Governour of Pennsylvania and Delaware, or the lower counties as they were then called, made a proclamation

Assertion of the Penn title by Delaware, 1775.

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making known the premises, and on the 2nd Sept. 1775, it was enacted by the Legislature of the lower counties, in an act reciting the articles of agreement, decrees and proclamations, that certain lines which were then fixed, should be the divisional lines of the counties. The act does not profess to fix either the eastern or the western bounds of the province.*

* 1 Booth's Laws of Delaware, 567, 9.

The paper title of the United States was completed by an act of Assembly of the State of Delaware, May 27, 1813; by which it was enacted, that "all the right, title and claim, which this State has to the jurisdiction and soil of the island in the Delaware commonly called the Pea Patch, be and the same is hereby ceded to the United States of America, for the purpose of erecting forts, batteries and fortifications for the protection of the river Delaware and the adjacent country," &c. &c. reserving jurisdiction, &c.†

Cession of the Pea Patch to the United States, May 27th 1813.

† Digest of Delaware Laws, ed. 1829, p. 673.

The same counsel, in order to show, more specifically, that absolute control over the whole river within the twelve miles circle, had been, at least, *claimed* from early days by the lower counties, proved that about the year 1707, a law was passed at New Castle, whereby a tax of half a pound of powder for each ton of measurement, was laid upon every vessel bound up or down the river; that the lower counties proceeded to enforce the tax by firing upon vessels which would not pay it; that although the General Assembly of Pennsylvania strongly remonstrated against the matter, the law was never repealed, though its execution was stopped by defiance and resistance from Pennsylvania vessels.‡

‡ 1 Votes of the Pennsylvania Assembly: Part II. p. 170.

So far as to the paper title of the respective parties,

as the same was proved by original deeds or early legislative action. OCT. & NOV. 1847.

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As to the jurisdiction exercised, *de facto*, in the river, it appeared on behalf of *New Jersey* that Egg Island, a small island low down in Delaware bay, and Stypson's Island, whose position could not be found by counsel, but both of which were admitted to be without the circle, were held under New Jersey, though how, or for how long, did not appear. Further, that some time since 1832, a boat-man having committed an assault upon some person on the river within the circle, a constable of New Jersey pursued the criminal to the Pea Patch and arrested him. "The constable had process," *that is*, said the witness, a military person, "he had *a pistol;* he shewed no process but that." The boat-man refused to go to New Jersey, said he would go on *lawful* process; process from Delaware; and did not go with the constable, who went away and never came back after him. On the part of *Delaware*, the evidence was more full. Reedy Island and Bombay or Boonprie Hook, the only island within the circle, had always, so far as appeared, been considered as part of Delaware, to which State the people also were considered as belonging. Both these islands, however, lie close to the Delaware main land; the latter being within its profile, and separated from it only by an artificial cut or canal.

Exercise of jurisdiction *de facto*. New Jersey.

Exercise of jurisdiction *de facto*. Delaware.

Twelve persons were examined from the State of Delaware, most of them aged, and likely, it was said, from their professions or pursuits to be acquainted with the fact of what jurisdiction generally had been exercised over the circle by Delaware, for the last seventy years or more.

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Among them was the Hon. THOMAS CLAYTON, aged seventy years and upwards, sometime a member of the Legislature of Delaware, afterwards Attorney General and then Chief Justice of that State, and more recently its representative in the Senate of the United States. "It has been held," said this witness, who had resided all his life in Delaware, "it has been held, as far back as my memory goes, by the courts, publick officers, and lawyers of Delaware, that the title and jurisdiction of the State of Delaware extended to a circle of twelve miles around New Castle, *to low water mark on the New Jersey shore.* I never heard the title or jurisdiction of the State doubted, over that part of the river Delaware, by any one, until the claim of Doctor Gale was set up to the Pea Patch; and since that, I have heard no one in the State of Delaware, lawyer or other, doubt it. Writs have been issued by the courts of Delaware to seize vessels and persons in all parts of the river indiscriminately, within the twelve mile circle, and I never knew such a seizure to be disputed in any court of Delaware, on the ground of want of jurisdiction over all such parts of the river."

Testimony of the Hon. Thos. Clayton.

Exercise of jurisdiction *de facto.* Delaware.

JAMES ROGERS, Esquire, sixty years old, for most of his life a resident in or near New Castle, and for twenty years Attorney General of Delaware, testified as follows: "It has been uniformly considered by the courts, publick officers and lawyers of the State of Delaware, that her title and jurisdiction extended within a twelve mile circle around New Castle, *to low water mark on the Jersey shore.* I have never heard her title or jurisdiction over that part of the river Delaware doubted by any court, publick officer

Testimony of Jas. Rogers, Esq.

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or lawyer in Delaware. I know that writs have been often issued from the courts in Delaware for New Castle county, and that by virtue of such writs, persons, vessels and cargoes have been arrested and seized within the jurisdiction above alluded to; and in no instance, within my knowledge, was the jurisdiction ever disputed, or any question made as to the jurisdiction of the State, when such persons were arrested or vessels and cargoes seized. I have in many cases caused writs to issue and persons to be arrested, and vessels and cargoes to be attached and seized upon the river Delaware, and within the aforesaid jurisdiction, and have been concerned in cases where process of attachment has been issued by other members of the bar. I recollect one case, in the Supreme Court, *Richards vs. Dusar*. I was counsel for the defendant, and every defence was set up that was considered available, but no plea to the jurisdiction was set up." [The record of this suit was attached to Mr. Rogers' deposition, and showed that four pleas had been put in.]

Testimony of Jas. Rogers, Esq.

Exercise of jurisdiction *de facto*. Delaware.

"With respect to lands held by warrant, survey and patent, from William Penn and his heirs, the title has been universally held as good title. It has been always held by our courts that the Penn title, under the Duke of York, was the true title to the lands and waters in Delaware, so far as my knowledge extends. I know no other title than the Penn title, a few titles held by grant from the aborigines and from the State excepted."

Validity of the Penn title.

The Honourable JAMES BOOTH, Chief Justice of Delaware, aged fifty-seven years, who was born in

Testimony of Chief Justice Booth.

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New-Castle, and, with the exception of four years had resided there all his life, testified to the same effect, essentially, as to the jurisdiction, though in language more qualified than Mr. Rogers. On the subject of the Penn title he added: "There never was any doubt or question, so far as my knowledge and information extends, of the justice and legality of the Penn title, under the Duke of York, to the lands within the State of Delaware. It was always considered, in this State, the true title to the lands and waters in the State of Delaware; although I have seen on record some old title papers for lands from the aborigines of the country, and from Sir Edmund Andross, before the date of the deed from the Duke of York to William Penn. I have seen many titles incepted in court by the Penn warrants, surveys, and patents, and have always understood and believed that all lands and waters in the State of Delaware, within the twelve miles circle, are held under the Penn title."

Exercise of jurisdiction *de facto*. Delaware.

Validity of the Penn Title.

Testimony of Ex-Chief Justice and Chancellor Johns.

The testimony of KENSEY JOHNS, Esquire, was particularly relied on by the counsel of the United States, as well from the venerable age to which this witness had attained, as from his most respectable understanding, attainments and character, and from the great opportunities which he had had of becoming acquainted with the subjects on which he spoke. "I was eighty-eight years and four months old," said this witness, "on the fourteenth day of last month, (October, 1847.) I reside in the town of New Castle, in the State of Delaware. I have resided here since the year 1780. My business has been a practising lawyer for twelve years; after-

wards, Chief Justice of the Supreme Court of the State of Delaware for thirty-eight years: afterwards, Chancellor of the State: since that time and at present living a private gentleman."

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"I have known the island since the year 1780. At first it appeared about the size of a man's hat. In 1813, when the United States took possession of it, it had grown to be a large island. It was not worth a cent to any private citizen. The expense of banking would have been more than it was worth. It has always been considered and held," continued the ex-Chief Justice and Chancellor, "by the courts, publick officers, and lawyers of Delaware, as far as my memory reaches, that the title and jurisdiction of the State of Delaware extended to a circle of twelve miles around New Castle *to low water mark on the New Jersey shore.* I have never heard the title and jurisdiction of the State of Delaware over that part of the river Delaware doubted by any court, publick officer, or lawyer in Delaware *on any occasion whatever.* Within my knowledge and remembrance, writs have been often issued out of the courts of Delaware to seize vessels and persons in all parts of the river Delaware within the circle of low water mark on the New Jersey shore; and no dispute, question, or plea was ever made or suggested, within my memory, before any court in Delaware against the title and jurisdiction of Delaware over all such parts. The State of Delaware, for the whole period of my remembrance, *and as far as my researches extend,* has claimed and exercised title and jurisdiction over the Delaware river and soil thereof, within the circle to low water mark on the

Exercise of jurisdiction *de facto.* Delaware.

Testimony of Ex-Chief Justice and Chancellor Johns.

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Jersey shore, and the State has never failed to exercise this jurisdiction when called upon or asked to do so."

STATEMENT.

Validity of the Penn Title.

"The lands in Delaware generally are held under the title of William Penn and his heirs. The Penn proprietors granted title by warrant, survey, and patent. In action of trespass or ejectment, the plaintiff incepted his title by the warrant and survey. I never heard of any doubt, in the courts of Delaware, of the justice and legality of the Penn title to the lands in the State of Delaware. It has always been held as the settled maxim within the Delaware courts, that the Penn title, under the Duke of York, was the true title to the lands and waters in Delaware. I have seen a great many, (I cant say how many) titles incepted in court by the Penn warrants and surveys. The lands and waters generally in Delaware within the twelve mile circle, are held under the Penn title."

Exercise of Jurisdiction *de facto.* Delaware.

Testimony of Ex-Chief Justice and Chancellor Johns.

In addition to the above testimony which, so far as it spoke of the circle *generally*, was corroborated to some extent by records, there were three or four well attested instances of process which issued from the State of Delaware having been served *close upon the Jersey shore.*

Testimony of Thomas Janvier.

Mr. THOMAS JANVIER, aged seventy-five, a resident of New Castle, and for some years engaged in trade there, said: "It is within my memory that R. C. Dale, who was sheriff of New Castle county from 1803 to 1806, after summoning a posse, boarded a ship on her outward passage, and arrested a person on board of the ship *after she had been run ashore on*

the Jersey side, nearly opposite the town of New Castle; the names of the parties and the minute detail of the affair, I do not now remember. About twenty-five years since, I accompanied the deputy of the sheriff of New Castle county, and with him boarded a sloop then *between the Pea Patch Island and the Jersey shore*, and was with the deputy sheriff when he arrested the captain of the sloop by virtue of a writ, issued out of one of the courts of Delaware. The matter was compromised with me, the captain of the sloop paying the demand; and we let him go."

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Exercise of jurisdiction *de facto*. Delaware.

Mr. WM. ROBINSON, aged sixty-five, residing all his life in New Castle county, stated that about the year 1834, he "accompanied the deputy sheriff, in a boat, for the purpose of arresting a person on board a schooner that was coming down *close on the Jersey shore*; the deputy sheriff boarded the vessel in that situation, and arrested the captain. The matter was compromised, and the captain was discharged from the arrest, on his paying some amount of damages claimed of him for running into a sloop laying at anchor off this town."

Testimony of Wm. Robinson.

Mr. JOHN STEEL of Philadelphia, aged sixty-seven, who kept a shop in New Castle in 1800, gave the following account of an arrest made within his knowledge: "While residing at New Castle, I had occasion, in July or August 1800, to serve process on a man who was boatswain of the United States ship Scammon. I took the advice of George Read, Esq. District Attorney of the United States, a lawyer of eminence in Delaware. He told me to

Testimony of John Steel.

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follow the man as far as low water mark on the Jersey shore, but no further. I went over after the man, and caught him at the end of the wharf in his boat as he was going ashore. He was outside of low water mark at the wharf. I brought him back to New Castle, and he gave me an order to the officer at Washington for his back wages. I sent this order on to Washington, and got the money for it. *There were people who professed to know how to keep clear of process from Delaware; they would steer close to the Jersey shore.* Our custom was, in suing people, always to take process from Delaware. We never got any from Jersey. I was on terms of intimacy with the sheriff; boarded in his house a part of the time. Our instructions were never to go beyond the Jersey low water mark. I never knew any dispute about the jurisdiction. It was the well settled opinion in them days that the jurisdiction extended to low water mark on the Jersey shore. The man whom I arrested never sued me for trespass. He had a lawyer with him; Mr. Brown, perhaps, of Philadelphia, then a young man; or it might have been a student of Mr. Bayard's."

Testimony of John Steel.

Exercise of Jurisdiction *de facto*.

Delaware.

Inhabitant of Pea Patch votes in Delaware.

It further appeared that one Cockrin, in the employ of the United States and residing on the Pea Patch as tenant or agent, had been regularly assessed, had paid taxes and voted from 1836 to 1847, in Red Lion Hundred, New Castle County, Delaware, and that his vote had never been challenged.

Position of the Island in reference to the main channel.

Touching the POSITION of the island in regard to "*the main channel*," twelve persons, river pilots or captains of small vessels, testified that the western

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or Delaware channel was the main channel, that it was always so considered by all navigators, "always had been and always would be," said one witness; and that large vessels almost invariably took it, whether the wind was fair or adverse. They stated, however, that when the tide was high, and the wind fair, large vessels, if well navigated, could pass on the other side, as it was admitted that the United States ship of war, Pennsylvania, the largest which ever floated in the waters of the United States, had done in 1836, under those circumstances: but that vessels which could *beat* through the other, could not do so at all through this. The Jersey channel, it appeared was broad and very deep for a few rods just opposite the island, but at its *head*, in consequence of the Bulk-head shoal, grew narrow, and therefore less safe. The Delaware channel was soft; the Jersey one hard. The statement received by consent, of Mr. Wilson M. C. Fairfax, of the United States Coast Survey, which had been recently made, was thus: "The main and deepest channel of the Delaware river *opposite the Pea Patch* is on the Jersey side. The greatest depth of water in the channel on the Jersey side is 40 feet, and on the Delaware side 25 feet. The average depth of water in the channel of the Jersey side is 32 feet, and on the Delaware side 23 feet. But to take the *entire* channel on *either* side of the island, no vessel drawing more than 19 feet water at low water of spring tides can pass through. The Jersey channel is the *shortest* and *widest*, and both about equally curved."

Position of the Island in reference to the main channel.

Touching the position of the island in regard to *the two shores*, it appeared that the Jersey shore

Position of the Island in reference to the two shores.

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had been constantly washed away within the last half century, and so receding from the island; that drawing a line midway between the shores, 21 $\frac{9}{10}$ acres of the island were on the Delaware side, 65 $\frac{7}{10}$ on the New Jersey side; that the north extremity of the island would be 2090 yards from the Delaware shore, and 2130 yards from the New Jersey shore; the south extremity 2197 yards from the Delaware shore, and 1875 yards from the Jersey shore. And that the area of the island is 87 $\frac{60}{100}$ acres.

Possession of the Island.

With respect to the *possession* of the island, it appeared that in the spring of 1813, Dr. Gale having acquired the right of the Halls under the survey of 1784, went down there from Trenton, with fifteen or sixteen persons as fishermen, and built a fisherman's hut on piles. It was built of rough boards, was about 12 by 15 feet, had a stove in it, and the fishermen cooked and slept there. Dr. Gale fished here one season, leaving it in August 1813. The place was not a good fishery, owing to the strength and course of the currents, which swept the nets into deep water where the fish escaped. While he was there, Gen. Bloomfield of New Jersey, who was entrusted by the United States with selecting a site for a fortress, came there, saw him fishing there, and apparently claiming the island; rowed round the island with him and asked him what he would take for it. In December 1814, the United States sent a corps of engineers there under Capt. Clark of that service, to begin the fortress. No building of any sort, nor the vestige of one, was then on the island, which was occupied by hundreds of thousands of

crows, who made it a roosting place. Captain Clark remained there till 1816, from which time till the present, with the exception of a certain term in 1836–7–8, when Mr. Humphrey was in possession under a judgment hereafter mentioned, the possession was in the United States. OCT. & NOV. 1847.

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The following MISCELLANEOUS FACTS were also put in evidence. Miscellaneous facts affecting the case.

By Delaware:

I. That on the 7th December 1682, Penn, styling himself Proprietary and Governour of Pennsylvania and the *Lower Counties*, passed, with the advice and consent of the freemen of the province and counties aforesaid, "an Act of Union for annexing and uniting of the counties of New Castle, Jones and Whorekills, alias Newdale, to the Province of Pennsylvania, and of naturalization of all foreigners in the said province and counties annexed."* The preamble of this act recites the patent for Pennsylvania, and the release from the Duke of York: It then sets forth the two deeds from the Duke of York for the three lower counties, giving in full, and accurately, the description in each, and in the first, the words, "as also the said *river of Delaware, and soil thereof and islands therein;*" and states that the freemen of those counties have desired to be annexed to Pennsylvania. The enacting part provides for the union, and for the naturalization of such of the inhabitants as were foreigners. Then follow other acts of legislation in the same year, constituting the body of laws known by the name of "the great law." Act of Union 1682.

* 1 Booth's Laws of Delaware, 8, Appendix, where this act follows the two deeds of feoffment.

This act Judge Baldwin, in his opinion, hereafter

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mentioned, supposes to have remained in force until the American Revolution.

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II. That in the year 1702, the Proprietaries of East and West Jersey surrendered *all the royalties and powers of government* which they had derived under the charters of Charles II. to Queen Anne, who accepted the surrender: and that from 1702 till 1776 New Jersey was governed, not by the proprietaries, but by governours appointed by the crown, who with the provincial legislature constituted the royal government of the colony.*

Surrender of New Jersey powers of Government, 1702.

* Leaming & Spicer's Laws of New Jersey, 606, 607, 614, 628 and 629.

III. That in 1796, an order was given *in Delaware* for a warrant for "two hundred acres of marsh, to be laid on an island situated about five miles below New Castle in the river Delaware, called and known by the name of the Pea Patch." There was no evidence, however, that the warrant had issued or been laid or that any survey had ever been made. It appeared that the warrantee had abandoned the matter because he supposed that the necessary cost of reclaiming and embankment would be more than the island, when reclaimed and embanked, would be worth.

Warrant from Delaware, 1796.

By New Jersey:

I. That King Charles I. had granted to Lord Baltimore many years before the grant to the Duke of York, all the territory between the Chesapeake and Delaware bays.* [See a more particular acount of this grant, *ante* p. xlii.]

* Kilty's Laws of Maryland, 4to. Annapolis, 1799.

II. That a carefully engraved map in the Breviate (or paper book as it was called by counsel,) already

mentioned, being an exhibit of the *Penns* in their suit with Lord Baltimore, the circle was drawn but *to* the Delaware shore, on both the north and south parts of the circle; stopping at the river and not running into it; and that among hundreds and nearly thousands of maps of the United States and Delaware, published in all parts of the country and in the State of Delaware itself, this circle had never been brought further.

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III. That on the 7th February 1794, the State of Delaware passed a supplement to an act for opening and establishing a land office, and for the sale of all vacant and unlocated lands,* which recites, "that whereas, the right to the soil and lands within the known and established limits of this State, was heretofore claimed by the crown of Great Britain: And whereas by the definitive treaty between his Britannick Majesty and the United States of America, *his said Majesty* relinquished all rights, proprietary and territorial, within the limits of the said United States, to the citizens of the same, for their sole use and benefit, by virtue whereof the soil and lands within the limits of this State became the right and property of the citizens thereof, and who at the time of passing the act to which this is a supplement, had, and now have, full power and authority, by their representatives, to dispose of the same for their sole benefit, emolument and advantage: *And whereas the claims of the late and former pretended proprietaries of this State, to the soil and lands contained within the same, are not founded either in law or equity;* and it is just, right, and necessary, that the citizens thereof should be secured in the enjoyment of their

* 2 Booth's Laws of Delaware, 1174.

Act of the 7th February 1794.

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estates, rights and properties." It then confirms all patents, warrants and grants, by James, heretofore Duke of York, or the *pretended* proprietaries of the State, made at any time before January 1st, 1760; discharging them from all manner of rents, fines and services, and then goes on to authorize the issue of patents by the *State*.

STATEMENT.

Act of the 7th February 1794.

Opposing Judgments in two Circuit Courts of the United States, 1836 and 1838.

But the case as it came before Mr. Sergeant did not come upon the foregoing paper title, and the facts already stated which might be supposed to vary or control it. It was embarrassed by two judgments upon the title; one in 1836, in the New Jersey circuit, *Gale's Lessee vs. Behlin*, in favour of the New Jersey title; the other in 1838, in the Delaware circuit, *United States, Lessee vs. Cockrin*, in favour of the State of Delaware. The former judgment was preceded by a trial by jury, of three days, and by a long and very laboured charge in favour of the New Jersey title from the presiding judge, the late Henry Baldwin of the Supreme Court of the United States; a gentleman who had enjoyed considerable reputation while at the bar of Western Pennsylvania, was admitted to possess, at all times, uncommon activity of mental action, and to bestow occasional research upon his cases that nearly passed credibility. The judgment in the other case was for default of appearance. On the present trial, however, the case was presented in a different aspect from what it then appeared in. No evidence was given before Judge Baldwin of the deed from King Charles II. to the Duke of York, the non-existence of which was asserted by the New Jersey counsel, and taken

Judgment in New Jersey in 1836.

for granted by all present.* The coast survey not having yet been made, the existence of any considerable channel east of the Pea Patch was unknown; the western being considered the main channel. The island was assumed to be, and at that time probably was, in all its parts, nearer to New Jersey than to Delaware, and no evidence was given like that on pp. xlviii–liv. of any exercise or belief of jurisdiction over the circle by the courts of the latter State.

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The Judge, in his charge, admitted fully that prior to the American Revolution the western limits of New Jersey came only to low water in the Delaware. His argument then was, that the Duke of York had no title, inasmuch as his conquest enured to the benefit of the crown alone: that accordingly Penn and his privies in estate, could have no title under those grants. He admitted that Penn and his privies did have a right in virtue of long possession, improvement and colonization, but held that the limits of their estates were designated, not by

Judge Baldwin's Charge, 1836.

* The history of this deed is quite singular. It is not printed in any of the ancient books of Delaware Laws, though the Duke of York's are in all of them. It does not seem to have been put on record in either New York, Pennsylvania or Delaware. It appears, moreover, that when the Earl of Sutherland applied, about the year 1716, for "a charter of certain lands lying upon Delaware bay in the three lower counties, which he represents he is ready to prove do belong *to the crown*," and where the persons concerned for Mr. Penn, and several mortgagees and purchasers under him, and their agents were heard before the Attorney and Solicitor General, Northey and Thompson, that after much search of publick offices the existence of this deed was not discovered: and that too in a case where there is so obvious an impression on the minds of the Attorney and Solicitor General, that there *must* be some other title, that they say, "they presume the said Duke of York might have *some other grants thereof*, which *Mr. Penn might give an account of, but cannot, being under a lunacy*;" and which made them therefore submit, whether it would not be reasonable that the king's title should be established in Chancery before any grant should be made of the premises. 1 Chalmer's Opinions, 39–57.

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the metes and bounds set forth in the Duke of York's deeds, but only by actual claim and possession or government; and said that upon the evidence before him it was clear that Delaware had never set up rights in the Delaware, while it rather appeared that New Jersey had. Considering that the natural *language* of the deed for the circle, gave Mr. Penn a right to a complete circle of twelve miles round, the learned Judge said he was unable to give effect to it, inasmuch as such a construction would have given to Penn a large portion of Salem county, New Jersey; a district which the Duke had granted many years before to Berkeley and Carteret. He therefore thought it might be construed so as to make its boundaries agree with those which he supposed were settled by possession, which boundaries came, as he supposed, *to* the water and not *into* it, or at any rate not further than the middle of the main channel. And to support this construction, he relied on the fact that the deed for the country *south* of the circle—a deed for contiguous territory, between the same parties and made on the same day—did not profess to convey the river or subaqueous soil: facts which he considered authority enough for him, to explain the latter deed by the former, and to hold that this former deed could not have meant to do so either. He suggests that by the largest construction the deed for the circle could be held "to include only such islands and such parts of the river as lie between a direct line drawn from the north and south points where the circle strikes the Delaware."

Judge Baldwin's Charge, 1836.

But admitting that the deeds of the Duke of York

might have described the true boundaries of Delaware, Judge Baldwin ruled that at the Revolution, the State of Delaware "repudiating the grants of the Duke as usurpation on the acknowledged prerogative of the king," might "elect to hold the lands of the proprietaries, *in the original right of the crown.*" And he thought that the State had made this repudiation and election by the act of February 7th, 1794, reciting that "the claims of the late and former proprietaries of this State to the soil and lands contained within the same, are not founded either in law or in equity;" that her title thenceforth became founded on the Treaty of Peace; that in this condition of facts, the two States, by the Declaration of Independence, stood on an equal footing, and were equally invested with the rights of the King to all that part of Delaware river and its islands which the King had not previously granted: and therefore that this island, being to the eastward of the "main channel," and nearest to New Jersey, belonged to that State and not to Delaware. Independantly of these grounds, he relies on the doctrine of adverse possession, and says that as the Halls held the island under a survey made in 1784, and so had possession without adverse possession or claim under the State of Delaware, until 1815, a term of thirty-one years, the right of entry by that State was barred: and connected with what his Honour called "the general claim of the proprietaries of New Jersey to the islands in the Delaware from 1739, would make the title good by a prescription of seventy-four years of quiet enjoyment adverse to the right of the Penns: and this idea it was supposed might derive strength

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from a recital in the act of the New Jersey Assembly of November 24th 1831, which says it has been represented to the Assembly, that by virtue of the warrant and survey of 1784, the Halls had "become seized and possessed of the island," and assumes that by mesne conveyance, Dr. Gale had "become seized and possessed."

Judge Baldwin's Charge, 1836.

Under the judgment in New Jersey, the Marshal of that Circuit delivered possession to Mr. Humphrey, to whom all the persons on the island made themselves tenants at will.

Judgment in Maryland, 1838.

And on the judgment in the Delaware Circuit, the Marshal of that Circuit delivered possession to the United States.

Each party offered that judgment which was in its favour, as conclusive on the title: but as the jurisdiction of the courts which gave them, depended entirely upon the fact whether the island was within their territorial circuit, that is, whether it was within Delaware or New Jersey, and as this point was the very one here to be decided and could not be decided without hearing the whole case, the parties consented, on the recommendation of the arbitrator, to give both judgments in evidence, without prejudice, and to wave a decision of the case upon a point of mere evidence, and in a preliminary stage.

Mr. CLAYTON and Mr. BAYARD for the United States:

Before the argument in this case, the counsel of the United States said that they begged to join with their learned friends on the other side, in acknowledging the

kindness which had been extended to all the counsel who had been concerned in this trial, by the civil authorities of the city, and especially for the honour of being allowed to conduct the argument of the case in the Hall of American Independence. It seemed to be an appropriate place for the discussion of the means of defending this noble city, which was, in truth, the birth place of American freedom. They tendered the hearty thanks of themselves, their opponents and all concerned, to the city authorities for the accommodations which had been freely furnished for the hearing of the case. Those thanks were also due to the Historical and Philosophical Societies, to the Athenæum, and to the Law Association of this city, all of which had munificently furnished their books, documents, and charts, many of them being no where else to be found. On both sides, we have the benefit of libraries, yielding more information on the peculiar subject we have to discuss, than could be found in any other city of the Union. Our thanks are also due to many gentlemen of the profession in this city, and to antiquarians for the information furnished by them. With the aids thus afforded us on both sides, we are all satisfied that we have had a fair and full trial, and that the testimony in the case is so full as to develope the entire merits of the controversy. Nov. & Dec. 1847.

The question is, whether Delaware has the exclusive right to all the Delaware river with the islands in it, and all the subaqueous soil contained within that circle whose centre is New Castle and which has a radius of twelve miles extending from that place as a centre. Delaware claims no right in Mr. Clayton and Mr. Bayard's argument in favour of the Delaware title, Nov. 27th and 29th; Dec. 2d and 3d.

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the river above the circle, and none greater than New Jersey below it. We say 1. Mr. Humphrey *has no title.* 2. The United States has a good title.

On that first branch of the matter, we contend:

1. *Mr. Humphrey's grant is bad in form:* He claims under a proprietary warrant authorizing the survey of *land;* a warrant which does not authorize a location upon the bed of a great navigable river, as this place was in 1784, and in part is still. Then the surveyor, who returns this survey, certifies that he surveyed an island in the Delaware containing 178 acres. We know, from the actual measurement by the Coast Survey, that the island contains but 87 $\frac{60}{100}$ acres at this day, and the testimony has proved that about the year 1783 the island first appeared above low water, not larger than "a man's hat." It is apparent therefore, that there was no actual survey made by virtue of these fragments of warrants, and that the statement of the surveyor was made because the fragments of the warrants, when added together, made that number of acres, within an insignificant fraction. It was a fictitious survey, and no title founded on such a foundation can be good. But waving this class of objections, and admitting that Mr. Humphrey has a proprietary grant good in form, we say,

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2. *That New Jersey never had any title.* The territory known as New Jersey was limited by its original charter to low water-mark. The language of that grant and of all subsequent grants indicates an exclusion of the river. They all grant land bounded *by* the river, with many easements *in* the river; but

the river itself or its soil is conveyed by none of them. The original charter grants the Hudson river. The maxim of "*expressio unius*" applies strongly. This natural construction of the charter is sustained by authority. In 1721, the Lords Commissioners of Trade and Plantations sent to Sir Robert Raymond and Sir Phillip Yorke, then Attorney and Solicitor General, the clauses of the Pennsylvania and New Jersey charters which fixed the boundaries of those provinces, and desired their opinion "whether Delaware river or any part thereof, or the islands therein lying, are by said clauses conveyed to either of the said provinces, or whether the right thereunto doth still remain in the crown?" "We have perused the said clauses," says the opinion of these great lawyers, "and have been attended by the agents of the parties who claim the Province of Pennsylvania, and their counsel, who laid before us a copy of the letters patent granting the provinces, and have heard what hath been alleged on both sides. And upon consideration of the whole matter, are of opinion that *no part of the Delaware river or the islands lying therein, are comprised within the granting words* of the said patent, or *of the said annexed extract of the grant of New Jersey*, but we conceive that the right to the same still remains in the crown."*

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Mr. Clayton and Mr. Bayard's argument in favour of the Delaware title, Nov. 27th and 29th; Dec. 2d and 3d.

*1 Chalmers' Opinions, 59.

In 1820, Virginia having granted to the United States many years before, her "right to territory northwest of the river Ohio," it was conceded by the Supreme Court of the United States that her title still extended all across the river. Chief Justice Marshall says: "When a river is the boundary between two nations or States, if the original property

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is in neither, and there be no convention respecting it, each holds to the middle of the stream. *But when, as in this case, one State (Virginia) is the original proprietor, and grants the territory on one side only, it retains the river within its own dominion; and the newly created State extends to the river only, and the low water mark is its boundary.**

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* Handly's Lessee v. Anthony, 5 Wheaton, 375–379.

This case and the opinions of Raymond and Yorke were cited, and the principle just mentioned was recognized as true, by Judge Washington in 1823,† in its application to the boundary of New Jersey, now before us. "We think," says this judge, "the claim of New Jersey *under these grants*, to any part of the bay or river Delaware, below low water mark cannot be maintained."...."Neither do we conceive that the limits of the State can by construction be enlarged in virtue of the grant of all rivers, fishings and other royalties; which expressions ought, we think, to be confined to rivers, fishings and royalties *within the boundaries of the granted premises.*"

† Corfield v. Coryell, 4 Washington's Circuit Court Reports, 371–384.

‡ p. 385.

It is true he thought‡ that the enactments now cited in behalf of Mr. Humphrey, "prove beyond a doubt that the proprietaries of West New Jersey, from a very early period, asserted a right to the river Delaware *or to some part thereof* below low water mark and along its whole length," yet "how far this title in New Jersey may be affected *by the grants of the Duke of York to William Penn in* 1682, *of the tract of country which now forms the State of Delaware*," was a question, he says, which in the case before him, "it would be improper to decide."§ Though neither of these two cases was a *decision* on the point, they both concede what we here labour to es-

§ p. 386.

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tablish. That the State was limited by its charter to low water-mark was admitted in 1830, by counsel on both sides, in *Bennet vs. Boggs*,* and asserted by Judge Baldwin, who truly says, that though the proprietaries of New Jersey might *claim* to own and dispose of the fisheries in the Delaware, "their claiming beyond the limits of the charter could give them no title."

* 1 Baldwin, 73.

3. But admitting that the charter of New Jersey extended over the whole river, Mr. Humphrey has not got the New Jersey title. None passed by either the proprietary grant of 1784, or the legislative act of 1831.

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As to the proprietary title. In 1702 the proprietaries of New Jersey surrendered all their royalties and powers of government, and from that time ceased to govern the territory of New Jersey; reserving to themselves only what Lord Hale and other writers denominate the *jus privatum*—nothing more than the private right to the soil, which they held then and hold still. From 1702 to 1776, the beds of all the navigable rivers within her charter, being part of the *regalia*, were out of their reach and beyond their control. The royal government alone could grant them away. The Declaration of Independence transferred all the regalia and powers of government to the State of New Jersey, in her sovereign capacity: the proprietaries after the surrender, held neither the *jus regium* nor *the jus publicum*. Any grant by them of subaqueous soil was void. *Waddell vs. Martin et al.** being a case upon this identical charter, has decided the question. The Supreme

* 16 Peters, 367.

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Court of the United States there held a *proprietary* grant for subaqueous soil in the waters of the Raritan bay and river to be void, and sustained the holding of the defendant in that case, who claimed the submerged soil under a grant from the State Legislature. The ground of the decision was, that the regalia were in the State, and not in the proprietaries.

As to the State title, the Legislature said truly that "doubts" had arisen as to the *proprietary* title. But has it cured them? In 1815, this island was reclaimed by the United States. It rose above the flow of the tides. It was no longer part of the *regalia*. It became vacant land, for which none but the proprietaries could make title. Mr. Humphrey then, by the largest concession of facts, is in this predicament, that when the proprietaries conveyed, in 1781, the title was in the State, and when the State conveyed in 1831, the title was in the proprietaries. We say now, arriving at our second great position:

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II. THE UNITED STATES HAS A GOOD TITLE:

The existence of a grant by the crown cannot be doubted here. We have given all sorts of evidence of it. It can as little be doubted that it was made for Mr. Penn's benefit and not for the Duke's. The Breviate shows that it was in the possession of Penn's sons in their suit with Lord Baltimore, brought in 1735, and heard in 1750; and other testimony here, that it was found at the seat of the Penns in 1837–8. With such evidence we incept our title. We need not re-state it. (See ante pp.xxxix–xl.) Such a

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title proved by original deeds, found, far onward in two centuries, in their proper places, perfected by livery of seizin most formally delivered, and confirmed by the royal and ducal government in New York is impregnable. Its exhibition is conclusive.

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A question will probably be raised on these deeds as to the right of the King of England, since Magna Charta, to grant a river and the subaqueous soil to a subject so as to pass the islands subsequently arising in the river: but it is a question which is settled by authority. *Maritima incrementa*, says Hale,* belong, of common right, to the king, but may become the property of a subject by *grant* or prescription; and among these *maritima incrementa*, he speaks of those which come *per insulæ productionem*, the sort we are now considering. It is true that in such grants the *jus privatum* of the grantee is always subject to the *jus publicum*. The *right of navigation and passage and repassage*, unobstructed by nuisances and unimpeded by exactions, has always been admitted as a *jus publicum*, belonging to the people, and from which no grant by the crown could derogate. It is called a servitude belonging to the people.† Whether *the common right of fishing* in navigable streams is in the people at large, as part of the *jus publicum*, so as to prevent a grant by the crown excluding it, since *Magna Charta*, is a question yet open for discussion, but it has no bearing on this case. That the crown might grant a navigable river and the soil thereof, subject to the *jus publicum*, has never been doubted, and the propriety of islands arising in the river, cannot be a part of the *jus publicum*, because that refers solely to com-

* De Jure Maris, 14, 17. 18.

† id. 6.

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mon rights, and islands must, from their nature, be the subject of exclusive appropriation. The common right of *navigation* is now in all the people of the United States, and no State can control it; but the common right of *fishery* is in the people of each State, and to the extent of her jurisdiction, and within her territorial limits, the State may control or grant it. In this case, however, it is unnecessary to determine whether the right of fishing in the river Delaware, within the twelve miles circle, is exclusively within the jurisdiction of Delaware. Admitting, however, a common right of fishery in the people of the colony of New Jersey in 1682–3 and subsequently, this would not grant the river or its soil, whether the right arose from grant or prescription. A prescription, extending to a liberty, profit à prendre, or jurisdiction, such as liberty of free fishery, &c. is not an acquest of the soil or water, but leaves them where it found them.*

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*De Jure Maris, 32.

The argument which will also be made, that the Duke had no title to the property conveyed, until after the royal conveyance was made, and that therefore Penn's title was void, is not quite as "old as creation," but it was made more than a hundred years ago by Lord Baltimore in his suit with the Penns, was then answered by Lord Hardwicke himself, and, till now, answered beyond all power of renewal. The Earl says: "I will lay aside the question of estoppel, which is a nice consideration; for the Duke of York, being then in the nature of a common person, *was in a condition to be estopped* by a proper instrument. In 1683, the Duke of York takes a new grant from the crown, and having granted before, was bound

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to make further assurance; for the improvements made by Penn were a foundation to support a bill in equity for further assurance. The Duke of York, therefore, while a subject, was to be considered *a trustee;* why not afterward as a royal trustee? I will not decree that in this court; nor is it necessary, but it is a notion established in courts of revenue, by modern decisions, that the King may be a royal trustee. And if the person from whom the King takes by descent was a trustee, there may be grounds in equity to support that. And if King James II. after coming to the crown was a royal trustee, his successors take the legal estate under the same equity; and it is sufficient for the plaintiffs if they have an equitable estate." Nothing can be more sensible; nothing better founded both in the justice of the law and in the justice of morals. The Duke, no doubt, was "estopped," and the estoppel, working on the interest in the land, ran with the land. *Hermitage vs. Tomkins** is in point as to the Duke's being estopped. Lord Holt there ruled, "that if A, *not having any thing in certain land*, demises it by indenture to B, and *afterwards* A purchases the land, this will be a good lease *by estoppel*." And the second resolution in *Palmer vs. Ekins*† is equally in point as to the operation of this estoppel upon any second grantee of the Duke, if there ever had been such a grantee, which there certainly never was. That resolution, which makes no exception in favour of the crown, is thus: "Privies in estate, as the feoffee, lessee, &c. shall be bound by, and take advantage of, estoppels. If A lease by indenture to B lands in which he hath nothing, and afterwards A purchases

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* 1 Lord Raymond, 729.

† 2 id. 1550-1.

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the lands in fee, and sells them to D and his heirs, *D* shall be estopped. *And where the estoppel works on the interest in the land, it runs with the land into whosesoever hands the land cometh.*"

This doctrine is assumed as true in *Trevivan vs. Lawrance et al.** of which case the marginal abstract (made probably by Knightly D'Anvers or Sergeant Wilson) is this: "Where estoppel works on the interest of the land it runs with it, *and is a title.*"

* 1 Salkeld, 276.

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It may be admitted that in general the crown is not bound by estoppels; that is to say, no estoppel can arise from any grant or act of the king so as to bind the crown. But if the king acquires by descent, or otherwise, lands which are bound by estoppel as against the person under whom he claims, the estoppel will continue even against the crown.

† 10 Modern, 200, where it is said: "nor will any estoppel bind the crown."

The language in *The Queen vs. Delme*,† which will be cited on the other side, is the language, not of the court, for the case concludes with an "*adjournatur*," but of counsel in argument. The authorities referred to in support of it are 1st Siderfin, (a doubtful authority for any doubtful position) p. 412, and that is a short note deciding that the king may bring an action where he pleases; and Hobart, p. 339, where the ruling is "warranty collateral binds not the king without true and actual assets, nor by estoppels of his own recitals *ex certa scientia.*" This is in accordance with the distinction contended for, and it is believed that no case can be found contrary to that distinction. Even if the Duke was not thus technically "estopped," so as to pass a title at law, —of which, when coming by estoppel, it is said in one

of the preceding cases "an ejectment is maintainable upon the *mere estoppel*"—he surely was estopped in equity. His covenants for further assurance made him a trustee, whether a common or a kingly person; and what more is wanted here? Nov. & Dec. 1847.

But however imperfect Mr. Penn's title may have been in its origin, it was made perfect in various ways by confirmation from the crown. The letter from Queen Mary in 1694, is confirmation. It was a restoration in all things; in rights of soil and in powers of government. Then, how could the sons of Penn have sustained their bill in equity before Lord Hardwicke,* without a title and a good title. The bill in the curious Breviate here produced, shews that they set out their title very fully. The act of September 2d 1775, shews, moreover, that after being settled by Lord Hardwicke, Penn's title, as thus set out in the bill, was confirmed by Geo. III. in 1769, and by the State of Delaware *on the very eve of her Declaration of Independence.* The Legislature which passed the act of September 2d 1775, appointed the delegates who attended in this Hall, and declared her Independence ten months thereafter. She thus came into the Union, claiming the Penn boundaries; and the principle established by the Supreme Court of the United States is, that each State, on the Declaration of Independence, became invested with all the sovereign power within her colonial limits.

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* 1 Vesey, 444.

It has had indirect confirmation of a very strong kind. At the commencement of the eighteenth century the country was greatly excited by contests about the royal powers of government, in all the co-

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lonies, but especially those of New England. New Jersey surrendered them in 1702, and continued under a Crown Government from that day until the Revolution. The ministry of England procured the passage of the statute of Anne which prohibited the crown from granting charters with royal powers within the kingdom; and after that day no charter with such royal powers appears to have been granted among the colonies. But *Penn's* continued to be a proprietary and charter government, with royal and sovereign powers, subordinate to the crown, and in many respects resembling the government of a county palatine in England. He was never displaced but once, and then only to be restored. It derived further confirmation in 1717, when a powerful nobleman at the English court, the Earl of Sutherland, petitioned the King, without success, for a grant of Penn's three lower counties. The Privy Council referred the matter to Northey and Thompson, the Attorney and Solicitor General. The deed from the King was not before these officers: its existence was unknown to them. Penn, they say, was unable to appear, "being under a lunacy." The case was less strong than that here presented, yet the Attorney and Solicitor General conclude their report as follows: "On the whole matter, we humbly submit it to your Majesty's consideration, whether it will not be reasonable that your Majesty's *title should be established by the Court of Chancery* before any grant should be made of the premises."† Was any such effort at establishing the title in Chancery ever made by the Earl of Sutherland, by the King or by any one? It was not. Penn's title derived fur-

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†1 Chalmers' Opinions, 39–56.

ther confirmation from the decree of Lord Hardwicke,* which saved the rights of the crown, and gave liberty to either party to move to alter the decree in case the crown should ever disturb the possession. But no such motion was ever made that we have heard of, and we must infer that the crown never did disturb the title. Indeed, there is an opinion of Northey, Attorney General, expressly in favour of Penn's title to the three Lower Counties. The opinion was given in consequence of a contemplated agreement between the crown and William Penn, to purchase from Penn his right of government of the Province of Pennsylvania and the three Lower Counties. Its date is 1711, and it is stated that William Penn waited upon him with his title papers, both of the Province and three Lower Counties, and *had made out his title thereto.*†

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*Belt's Supplement to Vesey, Sr. 198.

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†1 Chalmers' Opinions, 32.

But it is said, or will be said, that in 1685, in the controversy with Lord Baltimore, the title was decided to be in the *crown*. Let us look at the history of that case. At that time Lord Baltimore contested Penn's title before the Privy Council. He claimed ***that his own*** patent from Charles I. for wild and uncultivated land, extended to the Delaware river. The Privy Council decided against his title, on the ground that the territory in dispute was not a savage country, (the only sort of country granted to Lord Baltimore to settle and civilize,) but was settled by a Christian people, to wit, the Swedes and the Dutch, who had been located on the Delaware before Lord Baltimore received his patent at all. Penn's title was not before the Privy Council. It was not necessary for him to show it. It was sufficient for

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his purposes to show that the crown had never granted it to *Lord Baltimore*, who, having petitioned the King on that occasion for a hearing on his title, stood before the Privy Council like a plaintiff in ejectment, bound to show a title; and he failed to do it. Penn, being heard before the council, in behalf of the crown, like a defendant in ejectment, folded his arms, and relied on the insufficiency of his opponent's title. The decree was in favour of the King, and properly so, because, as against Lord Baltimore his claim was good. But the King's claim, which was thus adjudged good against Lord Baltimore, was, as against Penn, good to this extent only, that he was "royal *trustee*" for Penn, who held all the beneficial proprietary interest.

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We maintain the Penn title, because it is the true title; and we are instructed by the concurring testimony of the best professional men in Delaware, that with one or two exceptions, the inception of title to land there is by a proprietary warrant and survey, whenever it is necessary to trace a Delaware title back to its origin. But whether Penn had the title or not from the Duke of York, the Duke had the title from the King. So the title was out of the crown; and the boundaries in the King's patent, which are nearly identical with those in the deeds from the Duke to Penn, are the proper boundaries of Delaware, even on the supposition that Penn had not the title. For, suppose the deeds from the Duke to Penn to be void, still the fact appears that the Penns held possession of the country, and governed it, for nearly one hundred years. They either held under their own title, or under that of the Duke of York,

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or by his acquiescence; and they held by the metes and bounds in the King's deed, which have always been the metes and bounds of the colony and the State. In this aspect of the case the title is just as clear as if the Penn title were indisputable. With regard to the jurisdiction exercised since the memory of men now living, we need not enlarge. The venerable Kensey Johns, whose high character for learning and integrity, and whose great opportunities for judging, must be well known to the Arbitrator—he, and all the other professional gentlemen who have been examined, swear positively that, so far as they have ever heard or known, the State of Delaware has exercised exclusive jurisdiction within the circle, and that they have never heard her right to do so questioned in Delaware, except in the single instance of these claimants under this Jersey title. Many of the witnesses give in evidence acts of jurisdiction by Delaware up to low water mark on the Jersey shore, her officers seizing vessels and persons, debtors, and offenders against the law, in all parts of the river within twelve miles of New Castle, without question of the Delaware right. On the other hand, the only evidence of the exercise of judicial jurisdiction by New Jersey, within the circle was, that a constable came to the Pea Patch to arrest a man who had assaulted another between the island and the Jersey shore. He showed no process but a pistol. The fisherman denied the jurisdiction of New Jersey and refused to go with the constable, who had to return without him; but the fisherman told him that if he would go *to Delaware* and get *regular* process

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from one of *her* courts, *he would go with him!* The fisherman understood the common law of the country; and the people there understood no different rule.

Without particularizing them, we need only say of the various legislative enactments of New Jersey, that none of them are of sufficient force to control the clear language of the charter, nor indeed to do more than countervail other enactments of the same State. The act of January 21st 1709, which brings the western limits of the counties but *to* the river,

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is strongly against them all, even if the State had a right to give herself, of her own mere motion, rivers and territories which belonged to others.

As to the adverse possession, the evidence has been already stated. (See *ante* p. lvi.) Was this such a *pedis possessio* as will constitute an adverse holding against the State of Delaware? Even if adverse possession made a title against that State; which the learned counsel on the other side, who come from States where the law may be different, will allow us to inform them that it does not. The State had no knowledge of it: It was an insignificant thing at best, which, if noticed, would not have been resisted. It proved to have been an unprofitable speculation, and because they knew that it would prove so, is the reason why the fishermen from New Castle never attempted any similar enterprise. You might as well go about to prove title to a whole forest, by showing that you had hunted the bear and the panther, or any other animals *feræ naturæ*, there, as to set up a title to an island under water at high tide, by proof that you had, at some time, fished for shad and herring on its margin. We say nothing of the absurdity

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of attempting to prescribe for a shoal beneath the flow of the tide. The proof of the case renders it unnecessary to discuss the law of prescription, or its application to such an object. It is said that Stypson's island and Egg island were held under grants from New Jersey. The islands were in the bay near the Jersey shore, and outside of the circle. We know nothing of either, or of the grants for them. In Smith's History of New Jersey,* it is mentioned that as late as 1758, the Indians claimed title to "Stypson's island, near Delaware river." If this be true, we may doubt perhaps the existence of any State grant for it prior to the Revolution. But we enter our protest against any attempts to establish a prescriptive right to either lands or waters within the limits of Delaware, by showing a trespass on what the law writers call "an unguarded possession," a trespass of which the State had no notice, or which was too insignificant to attract attention or resistance. If it could be proved that any citizen of New Jersey had built a temporary shantee on the little sand flat called Goose island, or even pastured a cow there, would it not be ridiculous to set up an adverse holding within the circle for the State of New Jersey, when the people on the opposite shore had either not noticed the fact, or, through charity for the poor man, had not driven him away?

* p. 415.

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The object of Penn, in obtaining the grant of the river and soil of the Delaware may be readily conceived. It was to command the *door* and *entrance* to his favourite colony of Pennsylvania, including the intended City of Philadelphia. He wished to protect that colony from the exactions on its com-

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merce to which it would be liable, in case the country on the right bank of the river, below Pennsylvania, and the river itself, should fall into unfriendly hands. The historian Ebeling, of Hamburg, tells us that the object was the *safety and security* of Pennsylvania;* not only the security of the navigation and commerce of the river, as necessary to the prosperity of his colony, but also the safety and defence of that colony against an invading foe. The power of establishing marshal law for the suppression of insurrection, mutiny, and rebellion, and the power of repulsing and expelling all invaders, were expressly conferred upon him by the Duke's deed, as explained by the subsequent deed from the King. Without the river, he could not erect a fort on an island within it, nor plant a chevaux-de-frise, to repel a hostile fleet; for, in his prior grant of the colony of Pennsylvania, of 1680, his whole colony was bounded on the east by the low water mark on the western side of the Delaware river. Observe the language of the deeds, connected with the circle. So far as they convey the land, it is only that lying *within* the circle; but when they convey the *river* it is different. They convey all the islands in the river, "and the said river (i. e. the *whole* river) and soil thereof lying *north of the southernmost part of the said circle.*" Penn had already the Province of Pennsylvania, stretching its broad side for nearly two hundred miles along the river. He next gets twenty-four miles of a small sterile country below, and *all* the river. Can it be doubted that he meant the grant principally for the benefit of the larger tract as well as of the small one? With the policy of the

*1 Hazzard's Penn. Reg. 34.

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compact of April 26th 1783, by which Pennsylvania surrendered one-half the river above the circle to New Jersey, we have nothing to do. But we think it clear, from the evidence before us, that there was some mistake about the Pennsylvania title, and that Penn was as great a statesman as some who have succeeded him. The opinion of York and Raymond, in 1721, that neither Pennsylvania nor New Jersey had title to the river and its soil, by virtue of *their* respective charters, was true, but this opinion would have been changed by the production of the deeds under which Penn acquired his title to the three Lower Counties, *and all the river and soil thereof north of the southernmost part of the circle.*

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Those deeds could not have been known, we think, to the commissioners who negociated the compact of April 26th 1783. There is ground to believe that islands in the Delaware were granted by Pennsylvania prior to the Revolution.*

* See Wallace, Jr's. Reports, pp. 72, 73.

As to the value of Judge Baldwin's opinion. The case was tried on the most imperfect information, and the charge is inconsistent and confused. But the doctrines of the court, as we read them, were unsound even upon the case as it there appeared. The doctrine of adverse possession we have disposed of. The line suggested as possible, from the two points where the circle touches the river, it will be seen by the chart, would actually give us the island which we claim, as well as a part of New Jersey which we don't claim. That part of the opinion in which he construes one of the Duke's deeds by the language of the other, merely because they were both executed between the same parties and on the

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same day, though for different tracts of territory, is an example of judicial license for which our law books furnish no parallel. Then Judge Baldwin considers the act of February 7th 1794, a disclaimer of the Penn title. We need not explain the true objects of the act, which are well known to the profession in Delaware. But whatever it may mean, or whatever it may do, it is apparent that one of its great objects was to confirm all the titles in Delaware which had ever been lawfully issued, either by the Penns or the Duke of York. The Judge calls the *recital* in the preamble of this act of Delaware her "repudiation" of the proprietary title. What he means by repudiation our law books do not advise us. Is it that the State is estopped to assert the truth by a mere preamble in one of her legislative enactments? But New Jersey could not take advantage of such an estoppel, if there were any, because she is a stranger to the act. There can be no estoppel which is not mutual. The holding of the Judge amounts to this, that Delaware, through her act of 1794, had, by way of estoppel, or, as he calls it, by "election and repudiation," ceded away a part of her territory to New Jersey. If so, New Jersey must have agreed to accept this portion of territory from Delaware, before she could become entitled to it. There must, therefore, have been some compact or agreement between the two States, the one to cede away a part of her territory, and the other to receive it as a part of hers. To this the reply is, that the Constitution of the United States declares,* that "no State shall, without the consent of Congress enter into any agreement or compact with another State."

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* Article I, § 9.

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The doctrine that Delaware, on coming into the Union, had her "election" either to affirm or repudiate the proprietary title, is a new doctrine, never heard of before. Who had the right to put her upon her election? What principle, or what rule of duty, demanded such a thing of her? If the Legislature of Delaware had asserted in a thousand preambles, that the Penns, in 1794, had no title to the vacant lands in Delaware, the whole of them would not have shaken the great fact established by all history, that William Penn was the owner of the vacant lands in the territories comprising the three Lower Counties.

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There yet remains another view of this case; and, if we are right in it, the title of the United States is good, although the utmost pretensions of New Jersey, which are that her title extends to the middle channel of the river, should be sustained. If she holds to the middle of the channel, where is that channel? Mr. Fairfax, of the Coast Survey, proves that the Jersey channel is the widest, deepest, shortest and most central channel. The inference must be that the volume of water which daily passes on the Jersey side, is greater than that which passes on the Delaware side. We have no definition in the books of what the "main channel" of a river is, but we suppose that such a channel is that one through which the greatest volume of water passes, and which is nearest to the centre of the river. Indeed Mr. Fairfax says in so many words, that the Jersey channel is "the *main channel*." It is true that pilots, and common watermen who navigate but small craft, consider the western channel to be the "main chan-

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nel;" by which they have meant, generally, that it has been more navigated by vessels than the other. But they appear to have been ignorant of the depth of water in the eastern channel, and their testimony reminds us of the refusal of some of the New York pilots to believe in the existence of Gedney's channel, long after the Coast Survey had published its soundings to the world. Our Delaware pilots, although among the best in the world, were unacquainted with the existence of Blake's channel, on the western side of the bay, before the Coast Survey disclosed its course and depth. In 1836 the Pennsylvania line-of-battle ship, the largest vessel that ever floated on the waters of the Delaware, passed down the Jersey, not the Delaware, channel. It is admitted that the bottom of the Delaware channel is soft, and the channel itself better known, which is the reason why it is preferred; as an injury from grounding on mud bottom would be less than an injury from grounding on a bottom of sand or gravel.

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It has been said that in ancient days the depth of water in the eastern channel was much less than it is at present, and that the river has been constantly gaining for a number of years upon the New Jersey bank. That does not alter the relative rights of the two States. In such a case, what is lost by one of two coterminous States is gained by the other; and if it had been proved that the main channel was formerly on the Delaware side, but that it had insensibly changed its course and passed through the Jersey channel while forming the island, the law of nations would, in that case, clearly give all the

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alluvia and all the islands westward of the new channel to the State lying on that side of it. The distinction is between alluvion and avulsion. A State loses or gains by the former, but not by the latter.

Mr. BIBB and Mr. EATON for the United States: The grant of the King to the Duke of York, 12th March 1663–4, was of an immense region extending from St. Croix in the State of Maine, to the southernmost extremity of the State of New Jersey. Its object, after dispossession of the Dutch, was colonization. It conveys all waters, fishings and royalties appertaining to the granted premises. The Duke, in 1664, conveys a very large portion of the tract to Berkeley and Carteret, with the same extensive estates, rights and privileges. Colonization was the sole object of this grant. Upon such grants, made with such objects, it is difficult to presume that a right to a natural portion of the river was withheld. If not essential to the purposes of the grant, it was largely conducive to them, and all presumption must be in its favour. The river was in early days the only mode of passing from the northern part of the colony to the southern; the colonists were constantly upon it passing up and down. It would have been inconvenient, in the highest degree, that crimes committed below low water mark should have been without the limit of any cis-Atlantick jurisdiction; amenable only to courts more than three thousand miles away. The Breviate produced on the other side, shews that in their suit with Lord Baltimore, the Penns actually adduced as part of *their title to Delaware*, this grant of 12th March

Mr. Bibb and Mr. Eaton's argument in favour of the New Jersey title, Nov. 30th, Dec. 1st and 2nd.

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1663–1. "It is pretended," says the Breviate,* "that as this grant to the Duke of York, when coming from the eastward, extends only *to the east* side of Delaware bay, so that it did not *by express words* include the three Lower Counties which are on *the west* side of that bay. But it was a very large and extensive grant, of several very large tracts and territories in America, *and passed as we say all lands appertaining to those extensive tracts.*" And by this the Penns claimed Delaware. This was carrying the matter certainly very far, and the intelligent counsel of the Penns properly admit, that *so carried,* it is a weak point in their case. It would have passed half a continent. But even in this extent, it was the doctrine of the Penn proprietaries of Delaware in 1735; and the State of Delaware cannot complain of that argument if, in 1847, we lay hold of what is but a hem of its garment.

* p. 37.

Mr. Bibb and Mr. Eaton's argument in favour of the New Jersey title, Nov. 30th, Dec. 1st and 2nd.

How does the case stand upon authority?

We have no knowledge of the circumstances under which the opinion of the crown lawyers was given in 1721.† It is probable that it was upon the application of some person for a grant of those islands. There could not well have been any other occasion for it. Crown lawyers understood the proprieties of their office, and, as might have been predicted, the opinion is in favour of the crown. But was any grant ever made in accordance with it? any *act* done in consequence of it? Certainly none ever was; and considering the zeal with which these grants were asked for, we may well oppose the *action* of the crown, to the abstract opinion of its counsel. Looking only at "clauses extracted out of the char-

† 1 Chalmers' Opinions, 59.

ters of New Jersey and Pennsylvania," the crown lawyers may have been right; looking at the whole charters, their objects, the colonization under them, and the interpretation which had been made upon them, by fifty-seven years of practice and action, they were certainly wrong. Nov. & Dec. 1847.

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It is certain that in *Handly's Lessee vs. Anthony*,* the doctrine we oppose was but conceded, not decided. The judgment went on another point. But even the concession was upon a very different case. Virginia, a populous State, having a people living on its river, grants to the United States, out of pure liberality, "the *territory* northwest of the river Ohio." It grants territories, nothing else. It conveys no powers of government, nor appurtenances, nor privileges, nor rights, nor estates whatsoever, connected with, or appertaining to the original territory. The gift is limited "to *territory northwest* of the river:" the bare territory. Compare the language of the grant by Virginia with that of the grant by Charles II. ante p. xviii. One carries every thing: the other, land, and land alone. The difference between them is as wide as the poles. They are grants, and that is the only point of resemblance between them. *Corfield vs. Coryell*† is no authority either: for the case was decided upon the form of action alone; and though Judge Washington, referring to the grants of Charles II. and the Duke of York, does say, that *under these grants* (italicizing the words) the claim of New Jersey below low water mark cannot be maintained, he yet says, after looking at but a portion of the early New Jersey legislation produced here, that "these acts prove, beyond a doubt, that the

*5 Wheaton, 374, 385.

†4 Washington's Circuit Court Reports, 371–384.

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proprietaries of West New Jersey, from a very early period *asserted a right* to the river Delaware or to some part thereof, *below low water mark and along its whole length.*" It is unimportant for our case, as we shall shew hereafter, whether the right arose on a nice interpretation of the charter, or whether it arose from claim *de facto*. We beg to say too, that Judge Washington's limitation of the rivers, fishings and royalties granted, to those "within the boundaries of the granted premises," is a limitation different from that of the charter, which gives not those "*within*" the premises—but those "belonging and appertaining to them, with their and every *of their appurtenances.*" Who can doubt that the river Delaware is to some extent naturally "appurtenant" to New Jersey? It washes her shores along her whole western length. It receives the waters of her streams and rivers. The products of her soil are shipped directly upon it. Her people drink its water, and take its fish for their sustenance. They erect their mansions upon its margin, and contemplate, with the pride of ownership, the broad and beautiful expanse which gives to the landscape its crowning grace. It has always been so; so let it ever be! You might as well tell the people of New Jersey that their title papers were blanks, and their estates "air, thin air," as tell them that the mud which the receding tide exposes, is all their right in this noble stream; this stream so nearly connected with their present enjoyment, their future wealth and their ancient glory

Mr. Bibb and Mr. Eaton's argument in favour of the New Jersey title, Nov. 30th, Dec. 1s and 2nd.

Of *Bennet and Boggs** we need not speak. It was decided upon the last two cases, neither of which is authority for its doctrine. Much better authority

*1 Baldwin, 73.

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on this particular subject is that of Chief Justice Tilghman.* In a case before him, a defendant of Pennsylvania being prosecuted by an inhabitant of New Jersey for taking oysters in Delaware bay below low water mark of the Jersey shore, set up, among other defences, that New Jersey had no jurisdiction. "Very laborious researches into ancient records have been made, to shew that New Jersey was bounded on the west by the bay of Delaware, and therefore could have no jurisdiction below the low water mark. Such a doctrine," says the Chief Justice, "would come with an ill grace from the courts of Pennsylvania, which is bounded on her charter, on the east, by the river Delaware, and yet has *always* claimed and *exercised* jurisdiction at least to the middle of the river, and finally settled, by a solemn compact with New Jersey, the right of navigation and jurisdiction as to the whole river. *In the construction of the colonial charter, ancient claim and usage, are entitled to very great weight.* Not long before the American Revolution, Lord Rochford attempted to obtain a grant from the crown of England of some valuable islands in the Delaware, opposite and near to the Pennsylvania shore, under pretence that the charter to William Penn was bounded on the east, by the river. *The argument seemed plausible.* But the proprietaries of Pennsylvania, having obtained a hearing before the King in council, and proved *that they had always exercised jurisdiction on the river*, always claimed those islands, and granted some of them for a valuable consideration, which had been improved at great expense by the purchasers, and were then very

* Kean v. Rice, 12 Sergeant and Rawle, 203, 209.

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valuable, *the claim of Lord Rochford was relinquished.*"

We have to regret that while this case is argued on one side by lawyers of Delaware, who are intimately acquainted with all her local and juridical history, who know instinctively where to apply for evidence of all that *she* has ever claimed; it should be argued in behalf of New Jersey by those who have scarcely any knowledge of what relates to her peculiar history or claims at all. There are many islands in the Delaware which lie nearest to her shore; some of them have been held under title prior to the Revolution, and no doubt the records of her land office would shew that they are held under warrants from her, as those nearer Pennsylvania are affirmed by Chief Justice Tilghman to be held under warrants from that State. It would appear from Smith, the Historian,* that New Jersey claimed Stypson's island, which is believed to be in the Delaware; and we are credibly informed that Egg island is held under a New Jersey warrant. It is not important that these islands are without the circle; for according to the argument of the other side, New Jersey did not come, any where along her whole extent, below low water mark. If she came below that mark *without* the circle, the same charter or the same usurpation would take her below, *within* it. As for Reedy island and Bombay Hook, nothing can be inferred from the claim of them by Delaware, though within the circle, for they both lie much nearer to Delaware than to New Jersey. Here, let it be remembered, was New Jersey, a great State, with soil and powers of government granted

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* History of New Jersey, 445.

away; remote from the parent country; its people stretching themselves, as is usual in a new country, along the water's margin. How naturally would they by degrees usurp rights beyond those granted by their deed! Pennsylvania we see did it; and the usurpation was admitted by the crown. New Jersey had been there sixteen years before Pennsylvania, and having no opposite neighbours, was still more likely to do it. Individuals may not be able to prescribe against the crown, but a distinction in favour of colonies—of nations as these truly were—seems entirely natural. "I am of opinion," says Lord Hardwicke in his opinion upon the disputes between the Penns and Baltimore,* "I am of opinion that full and actual possession is sufficient title to maintain a suit for settling boundaries: a strict title is never entered into in cases of this kind, neither ought it... I will say once for all, that long possession and enjoyment, peopling and cultivating countries, is one of the best evidences of title to lands in America that can be; and so I have always thought in all cases since I have served the crown; for the great beneficial advantages arising to the crown from settling, &c. is that the navigation and commerce of this country is thereby improved. The persons, therefore, who make these settlements ought to be protected in the possession as far as law and equity can." Now, with even our imperfect evidence we can shew, that in all probability the State of New Jersey did never consider herself as bound by low water mark. Pennsylvania, bounded just like her, we see did not. Why should New Jersey be presumed to have done so? It was against her convenience. It was no where

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* 1 Vesey, Sr. 444, 453.

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so directly prescribed to her. *Handly's Lessee vs. Anthony* had never raised doubts upon the question, and the general law of nations was in her favour. We find, accordingly, that six years before the Duke of York's grant to Penn for the circle, New Jersey actually grants "convenient portions of land for wharves, keys and landings."* There was no limitation to their extent. A break-water to the middle of the bay and wharves to an indefinite extent in the river, were both within the right. In 1693,† she declares Delaware bay "within the boundaries of *her* government," and in the strongest way treats its whalery as within her jurisdiction. In 1725,‡ she taxes the ferries across the river, and enacts such laws as shall compel the neighbouring colonies to pay the tax. In 1771,§ she treats the *soil* of the river as well as its waters completely as her own property, giving to commissioners "authority to clear, scour, open, enlarge, straighten or deepen" the river; to remove any obstructions in it; and provides for the trial of any offence against the act, committed upon the river. All these acts, with others not very unlike them, are publick acts of her Legislature, which it must be presumed were known, and which, so far as the evidence goes, it is certain were never opposed nor questioned by any body, least of all by Delaware. We repeat, it is of no moment that they are not specifically applied within the circle. The whole of the western boundary of New Jersey, so far as the charter limits give it, is the same: and in construing the charter as coming below low water mark, there is no limitation to those portions above and below the circle, nor exception of that part within

*Ante, p. xix.

†Id. p. xx.

‡Id. xxi.

§Id. xxiii.

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it. Now what on the other hand is the title of Delaware? The deeds to Penn from the Duke of York certainly convey no title of themselves. But it is said that the royal charter of 22d March 1683, to the Duke of York made good, "by estoppel" or some other operation of law, a title which, of itself, is conceded to be bad. But to this position there are objections:

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I. That charter could convey nothing which had been previously granted to Lord Baltimore, as all the land between the Chesapeake and Delaware Bays had been. It is of no use to say that Penn finally established a title to the Delaware half of that same territory, in *Penns vs. Baltimore*. He did so as the report of the case shews, principally in virtue of the articles of agreement of 1732, coupled with long possession and colonization. The order in council of November 7th 1685, which was made *after* the charter to the Duke, gave this territory to the King, not to Penn; and that order, so far as Lord Baltimore was concerned, deprived him of no right under the charter;—which could not be repealed, it is submitted, by any order of council, nor otherwise than by *scire facias* to repeal the charter for deception, or as having been improperly granted. What motive Lord Baltimore had for entering into the articles of 1732, by which he surrendered a portion of his territories, we need not inquire. That he thought them unjust is clear, since he strongly resisted their execution. It is enough for our purpose that on them the Penns' bill was filed, and that on them with possession and colonization he got the decree.

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II. That if the charter did convey to the Duke of York, the estate which he, having nothing in, had previously granted to Penn, and if the Duke had been bound, as *a private person*, by the estoppel which, in virtue of the two deeds, might make a title to Penn, yet the Duke was freed from it so soon as he ascended the throne. "There is no arguing," said counsel in *The Queen vs. Delme*,* as if stating a well settled doctrine, "from proceedings at law between subjects, to suits where the crown is a party, because the crown has several privileges; as the crown may wave their demurrer, take issue and wave that issue. The crown may change their own venue. The Queen may amend her pleadings at any time, *nor will any estoppel bind the crown.*"

*10 Mod. 200.

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There is another inquiry to be made. Could the King of England, in his prerogative right, grant the beds of navigable streams where the tides ebb and flow, and which are thus reckoned arms of the sea? Does not Magna Charta prevent him, and does he not hold them in trust for the benefit of all the subjects of his realm, and not to be bestowed in monopoly or for individual benefit?†

†Martin v. Waddell, 16 Peters, 411.

Delaware then has no paper title; and what is the evidence of any claim, or exercise of exclusive right upon the river beyond the middle line; claim, it is meant, anteriour to the Revolution. That of the fort tax was met by resistance as soon as it was made, and abandoned by Delaware as soon as it was resisted. This case shews that Delaware was ready not only to assert her rights, but to assert much

more than her rights. Though Delaware incepts her title in a way which Penn always knew to be irregular, which the Earl of Sutherland asserted before the Commissioners for Trade and Plantations, in 1717, was void, and which the crown lawyers thought was very doubtful; though she was in dispute with the Maryland proprietaries for seventy-eight years, and through two generations of both the Penns and the Baltimores; and had, on these accounts, great motive to recur to her boundaries frequently, and to define them with precision; where is the act by which she has asserted that she owned all the river, its soil and its islands clear to the Jersey shore? The decree in Chancery* in 1754, had reference to the *western* boundary. It went upon articles of agreement between the parties. No one pretends that *Lord Baltimore* ever owned or even ever claimed either the river, river-soil or islands, within the twelve miles circle. His claim was *to* the river not *over* or *in* it; and the Penns contended that he did not even come *to* the river by many miles. Is it not then absurd to say that by a suit against Lord Baltimore for a specifick performance, Penn could acquire the property now in question. Besides, neither William Penn nor Lord Baltimore, in their agreement of 1732, had any power to contract for New Jersey; nor to compromit the rights of the colony of New Jersey by a bill and answer, and decree of the Court of Chancery in England, for specifick execution of a contract to which New Jersey was not a party contracting, nor a party in the suit. Lord Hardwicke, in his opinion and decree, states the case as a matter between the parties to the

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* Penn v. Lord Baltimore, 1 Vesey, Sr. 444.

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suit, and as not binding the tenure of the planters, nor the rights of the crown, nor the rights of any person not a party to the suit. While on the subject of Lord Hardwicke's decree, it is to be observed that so far from resting the Penns' case on their *deeds*, the Earl puts it upon possession and settlement as perhaps its strongest grounds.

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But admit that the deeds of the Duke and the King gave Delaware a right to the whole river and its soil, we think that the non-assertion of any title by herself, the constant counter-assertion and *action* by New Jersey,—both taken in connexion with the anomalous, ungeographical and unnatural character of the boundary—its variance, in the same continuous stream, from the boundary above and below it; its total want of definition, and the impossibility of giving it any, as to place of either beginning or ending; the uncommon facility, not to say the irresistable necessity for usurpation and encroachment; all urge to the conclusion, if the conclusion be any way possible, that she did in point of fact abandon the Jersey half.

Many witnesses, of whom we need say nothing except—*that they all came from Delaware*—tell us that since the Revolution, Delaware has always claimed and exercised jurisdiction over the river within the circle; that they never heard it denied or doubted in the State of Delaware. Both may be admitted. As to the first, the matter depends upon ante-revolutionary claim, not upon claim since the Revolution. We all agree that whatever boundary New Jersey had in 1776, that she has still. Re-

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specting the second, lawyers of Delaware were not in a position where they were likely to hear much of the claims of New Jersey. Of course they never heard the Delaware title doubted in Delaware, any more than they would have heard it suspected in New Jersey. They knew what they knew, but not what they did not know. They did not know what happened before they were born, nor what happened in places from which they were absent and remote. New Jersey was not heard by them, and they did not speak loud enough to be heard by New Jersey. The exclusive jurisdiction of the State of Delaware, attempted to be proved, is in its nature a negative; it amounts to nothing more than this, that they, these witnesses, men of a single generation, living in one State of Delaware, did not know every thing which, in the long track of time, had taken place in another State of New Jersey. The legislative enactments given by us in evidence rebut the negative evidence of ante-revolutionary "exclusive jurisdiction," attempted to be set up for Delaware. We have not brought the sworn testimony of the profession in New Jersey, but it is clear that Mr. Wall and Mr. Green, both of them holding office under the United States, have considered that Delaware did not have such rights as she claims; for they have both given opinions in favour of Mr. Humphrey and against the United States under which they were acting. All the trials referred to by our opponents have been in Delaware; and there is no evidence in any one of them, on which side of the middle line of the river the process in them was served. In a river so broad as the Delaware here is, having close to the De-

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laware shore the channel universally supposed to be the main one, and almost universally navigated; the large majority of the few cases where process appears to have been served on the river, would be on the Delaware and not on the New Jersey side of the line. They give, therefore, but little support to the Delaware claim. In no instance where the process is shewn to have been served on the Jersey side of the middle line, was there either resistance or trial.

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Of what judicial value—of what weight as precedents—the opinions of bound-bailiffs or of common sailors are worth, may be discovered, if it requires to be searched for, in the testimony of Mr. Janvier, taken by the United States. This gentleman who is brought to show practical illustrations of theoretical jurisprudence of more learned men, informs us that within his memory R. C. Dale, who was sheriff of New Castle County from 1803 to 1806, boarded a ship, with his posse, *and arrested a person on board of her, after she had been run ashore on the Jersey side!*

[The counsel then went into an argument upon the facts already stated, in order to shew that Mr. Humphrey had acquired a title to the island by *possession:* his warrant and survey were in 1784, from which time he was in possession until 1815, when dispossessed by a military force of the United States. This disseizin was a tortious one, and gave no title to the disseizor. Even if Delaware had a title to the island, she was not in possession in 1813, when she conveyed to the United States; and the counsel therefore assumed, that the transfer, being the transfer of

a "pretence title," was illegal. The doctrine of election and repudiation under the act of February 7th 1794, was also urged, with other points which were of less importance.] Nov. & Dec. 1847.

Then again, in 1784, when the survey was made for the Halls, the island was much nearer to the Jersey shore than now. That shore has been continually washing away since the formation of the island. The main channel of the river, the greatest volume of water, and greatest depth of water, *then*, was next the Delaware shore, however it may be at present. Now although the publick jurisdiction between two States on opposite sides of the river, having the river as their common arcifinious boundary, changes with the channel of the river, yet private rights acquired under the proper jurisdiction, before the change in the channel, are not annulled by the change of the current, nor transferred as publick domain to the other jurisdiction. The private right of property remains valid and secure through all changes of the channel of the river, if the land be not submerged or washed away. Whether therefore the island be, at this time, in New Jersey or in Delaware, it is still the property of Mr. Humphrey. It may have changed its sovereign: its owner is still the same.

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But finally, the language of the Duke's deed to Penn cannot be followed with the literality which a lawyer is disposed to give to every deed. "Land lying within the compass or circle of twelve miles about" the town of New Castle, would include land on the east just as much as on the north, south and west

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and therefore would include land in New Jersey, which the Duke could not grant as well as that in Delaware which he could. It can only grant that "land lying within the compass or circle," which the Duke had *a right* to grant, that is to say land in Delaware. By this grant of "land," neither the river nor soil of it passes. This the counsel of the other side have themselves asserted in regard to our proprietary warrant of 1784. Besides which there is an express grant of whatever islands, river and river-soil are conveyed. *The circle, then, stops with the river edge.* There is nothing to carry it to "land" across. The facts of the case force us to bring it but to this margin; and it is clear from the Penns' own map, which is prefixed as an exhibit to the Breviate of their solicitors in *Penn vs. Lord Baltimore*, that this was the construction which the Penns themselves gave to it. Now throwing aside all other questions, it will be seen, by looking at the chart, that by even giving to Delaware what the Duke's deed professes to grant her, that is to say, "all islands in the said river Delaware, and the said river and soil thereof lying *north of the southernmost part of the said circle*," she will not get the Pea Patch island. A line drawn northward from the point where "the southernmost part of the said circle" touches the river, leaves this island on the outside. Give her, then, all she claims and she leaves us all we ask for.

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Opinion.

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Mr. SERGEANT, the ARBITRATOR, having heard the evidence and arguments, and taken due time to examine and consider the matter, delivered the following opinion on the 15th January 1848, in one of the rooms of the Capitol at Washington, in the presence of the counsel of the respective parties, and also of a considerable assemblage of persons who thought fit to attend:

The Arbitrator, Mr. Sergeant's opinion, January 15th 1848.

The question submitted by the United States on the one side, and James Humphrey on the other, is thus stated in the submission: "To decide the question of the title to the Pea Patch island, as derived by the United States from the State of Delaware, and by the said James Humphrey, claiming through the said Henry Gale, deceased, from the State of New Jersey."

Preliminary Remarks.

The importance of the case consists chiefly in this; that it involves the question of the boundary for nearly twenty-five miles, between the two States just named. It is true that the settlement of that boundary is not submitted, nor to be decided in the arbitration; New Jersey and Delaware not being parties to the submission, nor having agreed so to submit their rights. But it is also true that in conveying, the one to the United States, and the other to an individual, the island in controversy, they have necessarily communicated to the grantees the right to assert the title respectively conveyed to them, and to dispute the adverse title: and it is very manifest that this controversy turns mainly, if not entirely, upon the question of the limits and jurisdiction of

JANUARY 1848. the respective States. If the Pea Patch island is within the State of New Jersey, the title is in Mr. Humphrey. If within the State of Delaware, the title is in the United States.

The Arbitrator, Mr. Sergeant's opinion, January 15th 1848.

The consideration and respect due to these States, as members of the Union, in whatever may touch their rights and interests, seemed to require that as much publicity as possible should be given to the proceedings; and an intimation to that effect was promptly acceded to by the city and county of Philadelphia, in liberally granting to the arbitration the use, first, of the Supreme Court chamber, and afterwards, of the venerable Hall of Independence. The arbitrator was attended by the counsel of the parties, who had laboriously searched out the evidence wherever it could be found, and followed its production with an able and learned, as well as interesting, discussion on both sides. It is believed that nothing has been omitted in either respect; and that there is no reason to suppose that any thing in the shape of evidence or argument remains unexplored, which could throw additional light upon the subject. It remains for the arbitrator, after careful deliberation, and with the aids just mentioned, having come to a conclusion satisfactory to himself, to make his award. In ordinary cases his duty would be performed by simply executing the needful paper, and giving it the direction which is required, in order to render it, as demanded by the submission, "final and conclusive between the United States and the said James Humphrey, claiming under the said Henry Gale, deceased."

Preliminary Remarks.

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But the same motives of consideration and respect, already stated, for giving the utmost publicity to the proceedings; the nature of the controversy; the length of time it has been pending; the names that have been connected with it, from whom he will feel himself bound to differ in his views, or at least to appear to differ; and, he must add, the great confidence reposed in him by the parties in leaving the matter so long litigated to his sole determination—a confidence which forbids him to doubt his ability to decide it, but by no means relieves him from an anxious sense of the responsibility of the task he has, by their invitation, undertaken—all these things concur to impose upon him the duty, as it is also his desire, to present, in an intelligible and somewhat permanent form, the grounds of his decision, for the satisfaction of the parties, and the examination of those who may feel any curiosity about the case, or any interest in it. He is fully aware that his opinion is of no authority whatever, except for the single purpose as to which the agreement of the parties has made it conclusive; that is, the question of title between them. He will, therefore, proceed to state these grounds as briefly as may be consistent with perspicuity.

The Arbitrator, Mr. Sergeant's opinion, January 15th 1848.

Preliminary Remarks.

The island in controversy, called the Pea Patch, lies in the river Delaware, rather less than five miles from New Castle, in a south-eastwardly direction. The most satisfactory evidence respecting it was given by Wilson M. C. Fairfax, Esq. of the United States Coast Survey, being from actual and careful survey and measurement. It was in writing and not under oath, but was received by consent of both

Position and size of the island.

JANUARY 1848. parties; and there is no reason to doubt its accuracy.* According to this witness, the length of the island is 1,083 yards, its average breadth 461 yards, and its area 87 $\frac{60}{100}$ acres The mid-line of the island, at its north extremity, is 2,090 yards from the Delaware shore, and 2,130 yards from the New Jersey shore. The mid-line at the southern extremity is 2,197 yards from the Delaware shore, and 1,875 yards from the Jersey shore. The middle line of the river Delaware, he says, run through the island, would throw 21 $\frac{9}{10}$ acres on the Delaware side, and 65 $\frac{7}{10}$ acres to the New Jersey side. Such a line, he states, would pass through the island 46 yards north-east of the south-west extremity of the wharf at the lower end of the island which projects towards the Delaware shore, and 20 yards eastward of the middle point of the upper end of the island. With respect to the water, the witness says, the main and deepest channel of the Delaware river opposite the Pea Patch is on the Jersey side. The greatest depth of water in the channel on the Jersey side is 40 feet, and on the Delaware side 25 feet. The average depth of water in the channel of the Jersey side is 32 feet, and on the Delaware side 23 feet. But to take the entire channel on either side of the island, no vessel drawing more than 19 feet water, at low water of spring tide, can pass through. The Jersey channel is the shortest and widest, and both about equally curved.

*Ante pp. lv. and lvi.

The Arbitrator, Mr. Sergeant's opinion, January 15th 1848.

Position and size of the island.

Witnesses have been produced to show which is the main channel of the river, as to which they have differed in opinion. The greater part, probably, have thought the western or Delaware channel to be the main channel. They have stated that the bottom on that side is softer and safer, as well as better

holding ground than on the east, though they state, also, that the eastern channel has undergone changes at different periods. Some of them have stated, too, and no doubt truly, that the shore on the Jersey side, opposite the Pea Patch, has been wearing away considerably for some years past. And, finally, some of them, judging only from sight, have asserted the island to be nearer to New Jersey than to Delaware. As to this, however, the evidence from survey and measurement, already referred to, is much more to be relied upon than opinions like these.

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The Arbitrator, Mr. Sergeant's opinion, January 15th 1848.

In the view to be taken of the case, and with reference to the grounds upon which it will be decided, it is not necessary to go into the particulars of the testimony just adverted to. The material facts, about which there can be no dispute, are these: The island is in the river Delaware, with a deep channel on each side; is far below the low water mark on both sides; is not connected with the land either of New Jersey or Delaware; and is at all times of tide surrounded by water. There is a shoal, called the Bulk-head shoal, from the northern end, towards the northward and eastward, but it is never bare; and is, besides, pierced by a channel of such width and depth, that vessels of heavy draught of water can pass through it. The only question raised about it, and that not at all material, is, whether large sized vessels can beat through it from the western channel to the eastern, or in the opposite direction, against a head wind. The fact is, that vessels can pass entirely round the island, upon the waters of the river, at all times of the tide. The island is in the waters of the Delaware.

Position and size of the island.

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The Arbitrator, Mr Sergeant's opinion, January 15th 1848.

It is proper further to state, that this island is of comparatively recent formation. Maps and charts, as late as the middle of the eighteenth century, do not mention it. Kensey Johns, Esq. who was eighty-eight years and four months old at the time of his examination,* a witness not more venerable for his years than for the high stations he has held, and the uniform excellence of his character and conduct through his long life, states that he had resided in New Castle from the year 1780 till that day. He then says, "I do know it, (the Pea Patch,) and have known it since the year 1780. At first it appeared about the size of a man's hat. In 1813, when the United States took possession of it, it had grown to be a large island. It was not worth a cent to a private citizen; the expense of banking would have been more than it was worth." The general conclusion seemed to be on both sides, that it had not made its appearance earlier than 1780, which in the argument, seemed to be an agreed time of its beginning to be visible, and was probably nearly correct. It would seem, with some allowance for what must be measurably hypothetical, to have sprung up from the bottom, in the deep channel of the river, dividing that channel into the two channels, whose respective titles to the dignity of the "main channel," have been so much controverted in the evidence and the argument. From other evidence it appears that, until the United States made some embankment, the island was nearly, if not entirely covered with water at every tide.

* Nov. 2d, 1847.

History of the island.

The main point, however, is that before mentioned, which will not be affected by any errour in the con-

jecture just stated. From its first appearance, the island has always been where it now is, that is to say, in the deep river, below the low water mark, surrounded by navigable water, and separated at all times from the land on both sides. JANUARY 1848.

The Arbitrator, Mr. Sergeant's opinion, January 15th 1848.

The description and account thus given of the subject of controversy, are deemed to be sufficient for the present, to introduce and render intelligible the several questions to be considered and decided. They are indisputable, it is believed, and stand as facts beyond the reach of the conflicts in the evidence as to other matters, not deemed to be important, and therefore laid aside.

Title considered.

We are thus brought, after stating what the thing in controversy is,—enabling us to judge by what kind of title such a thing can be claimed and held,—to the examination of the case made out by the respective parties. And it is proposed to begin with the case of Mr. Humphrey, as most conducive to the right understanding of the questions to be considered.

Has Mr. Humphrey made out a title?

Title of Mr. Humphrey considered.

He begins, taking the evidence in chronological order, with the copy of the record of two warrants from the proprietaries of West New Jersey, one dated November 4th 1743, for 600 acres of unappropriated land in West New Jersey, the other dated August 7th 1782, for 5,000 acres: a return of a survey under them for Edward and Clement Hall, October 8th 1784, "of an island in the river Delaware, called the Pea Patch, situate in the county of Salem, about one mile west of Finn's point, in Penn's neck, and is about west of the mouth of Salem creek, &c. con-

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taining 178 acres of marsh, sand bank, and mud flats; New Castle distant about 4½ miles." The record adds: "November 3d 1784, inspected and approved by the council of proprietors, and ordered to be recorded."

The Arbitrator, Mr. Sergeant's opinion, January 15th 1848.

This record, authenticated as it was, was good evidence by the laws of New Jersey, and therefore was good evidence in the arbitration. It was accordingly admitted.

Many objections were made to the warrants, and especially to the survey, which need not be stated. The answer to them all was this, that if the proprietaries of West New Jersey were the owners of the island, and had power to grant it, it was for them, and for them only, where there was no interfering right, to object to irregularities in the warrants or in the surveys under them. By accepting and approving the return of survey, and ordering it to be recorded, they waved all such objections, and no one else could make them, unless he had a right which was interfered with. The survey must, therefore, be taken to be good, and to have vested the title in the Messrs. Hall, if the proprietaries had a right to grant. From Messrs. Hall, the title, by mesne conveyances, was regularly derived to Mr. Humphrey, so as to vest in him all the right they had, which, as we have seen, was all the proprietaries could give, neither more nor less.

Title of Mr. Humphrey considered.

The survey of 1784 is good *as against proprietaries.*

The question then is, what right had the proprietaries? When Judge Baldwin gave his charge to the jury in the case of *Gale's Lessee vs. Behlin*, in the Circuit Court of the United States for the District of

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New Jersey, (which will be more particularly noticed hereafter,) the case of *Martin vs. Waddell*,* had not been decided by the Supreme Court of the United States, where it was brought by writ of errour to the Circuit Court just mentioned, upon a judgment there rendered, Judge Baldwin presiding. The decision of the Supreme Court was in 1842. Being upon a question within the jurisdiction of that high court, it is deemed to be of the highest authority in all inferiour tribunals, and, of course, in this, in point of authority, the most humble of all. The point there decided—to say nothing of the learned and satisfactory reasoning of the Chief Justice (Taney) in delivering the opinion of the majority of the court—the very point decided is, that after the surrender to the crown in 1702, by the proprietors of East New Jersey, of the powers of government, they had no right in the navigable rivers within the charter limits of New Jersey, nor to the soil under them, and have had none since. In this respect, the West New Jersey proprietaries stand upon the same ground precisely. Both surrendered the powers of government at the same time, and, it is believed, in the same terms. The decision of the Supreme Court equally settles the law for both. It follows, that the West New Jersey proprietors, at the date of the warrants and survey, and acceptance of the survey, had no right in the river Delaware, even though it had been within the charter limits of New Jersey, (which will be hereafter examined,) and could give no right in the island to Messrs. Hall. For, upon the survey itself, it appeared that the island was "in the river Delaware," and that it was "about one

* 16 Peters, 367.

The Arbitrator, Mr. Sergeant's opinion, January 15th 1848.

Title of Mr. Humphrey considered.

Proprietaries had no right to grant under any circumstances since 1702.

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mile" from Finn's point, the nearest land on the Jersey coast.

The Arbitrator, Mr. Sergeant's opinion, January 15th 1848.

The same point was decided in the same way by the highest judicial tribunal of the State of New Jersey. *Munday vs. Arnold,** *Shepard & Layton vs. Leverson.*† The first of these cases is said to have been upon a location made to try the right. In the other it came up incidentally.

*1 Halsted, 1.

†Pennington, 391.

The concurring judgments of the Supreme Court of the United States, and of the Judges of the highest court of New Jersey, in such a matter, certainly do amount to binding authority. In accepting them as such, however, it is not to be understood that any doubt is entertained of the solidity of the grounds upon which they were made. It may be deemed presumptuous, perhaps, even to suggest that they are approved, where approval is of so little consequence, indeed so entirely valueless, in comparison with the proper and intrinsick weight of the judgments of these high courts, and especially of the Supreme Court of the United States. It may be allowable, nevertheless, to add, in vindication only of the effort to fulfil the whole duty confided to the arbitrator, that if the question were new, and to be examined without the aid of the great light thrown upon it by the opinion of the Supreme Court of the United States, having fully and deliberately examined the question, he should, upon original grounds, come to the same conclusion that he most willingly yields to the rightful authority of the judgment. It seems contrary to reason, and against the spirit of our institutions, that great publick rights, in which all have an interest and concern in common,

Title of Mr. Humphrey considered.

Proprietaries had no right to grant under any circumstances since 1702.

should be without a publick guardianship, disinterested enough to regard all with impartiality, and powerful enough to protect them in the enjoyment of their privileges. Government is the proper trustee, everywhere existing with the consent or allowance of the people, and, in our representative republicks, by free election, with the power of change. If, in the discharge of such trust, portions might be disposed of, so as to diminish the common fund, still there would be no contradiction, as is supposed, of one or more of the grants by the State of New Jersey, for it must be presumed that such disposition is itself in some way for the common benefit, and on terms the least injurious to the publick. A private proprietor, on the contrary, looks only, and rightfully looks only, to his own advantage.

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Proprietaries had no right to grant under any circumstances since 1702.

Title of Mr. Humphrey considered.

The conclusion upon this point is, that the survey was merely void, that it gave no title, and that no title can be derived from it, the proprietors themselves having no right in a navigable river, nor any power to grant.

Survey 1784 void.

The next evidence of title exhibited and relied upon by Mr. Humphrey, is an act of the Legislature of the State of New Jersey, dated November 24th 1831, granting to Henry Gale, his heirs and assigns, "all the right and title of the said State of New Jersey to the said island called the Pea Patch, situate in the river Delaware, in the township of Lower Penn's Neck, in the county of Salem and State of New Jersey, as mentioned and described in the before mentioned survey," meaning the survey of 1784.

Act of Legislature of New Jersey, 1831.

This act, it will be seen, was passed about seven-

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teen years after the present controversy began, and during the time the United States were in actual possession of the island. The counsel of Mr. Humphrey, in the course of the argument, objected to the cession of the island to the United States by the State of Delaware, on the ground that the State was not in possession, but it was adversely held and possessed, and therefore could not be lawfully conveyed. The same objection applies to New Jersey. Whether such is the law of New Jersey or Delaware, is not known. It is believed not to be so. But it is not material to inquire into the matter, nor to examine particularly the evidence of possession, for a reason which seems to be a sufficient answer. Both acts of the respective legislatures, besides operating as grants, being passed with all the forms and sanctions of the constitution, were also acts of legislation, and, no third right intervening, could *pro tanto* repeal the general law, and give the required ability. Such would be their effect. If, then, the Pea Patch island was within the limits of New Jersey, and subject to her jurisdiction, there is no doubt of the sufficiency of the grant to pass the title of the State. The same may be said of the State of Delaware, whether they had champerty laws or not. It remains, too, to be shown that a sovereign State can be affected by adverse possession, unless so long continued as to found a presumption of grant.

The Arbitrator, Mr. Sergeant's opinion, January 15th 1848.

Title of Mr. Humphrey considered.

It may be further remarked, that in this act the State of New Jersey does not assert a right or title. In the preamble the act recites the survey of 1784, the mesne conveyances to Henry Gale, and then proceeds as follows: "and whereas, it *hath been sug-*

Act of 1831 don't assert a title in New Jersey.

gested that the State of New Jersey hath some title thereto, and by reason thereof doubts have arisen concerning the title of the said Henry Gale," and then goes on to grant "all the right and title of the said State of New Jersey." This remark, it must be observed, does not affect the legal sufficiency of the grant to pass all the right of the State, and entitle Mr. Humphrey to claim under it. It is good between him and the State of New Jersey, and entitles him to vouch in his own behalf all the well founded claims of the State. But the grant is not in the ordinary form of a conveyance of land. It is only a quit-claim, which one may give to quiet doubts, whether he has a right or no right. The value of the fact is only as it shows, that as late as 1831, when the island, by great expenditures upon it by the United States government for works of publick defence, had become an object of general attention and interest, the State of New Jersey made no assertion of right. The act, for a mere nominal consideration, simply relinquishes whatever right, if any, the State may have. And this remark may be further extended. It is believed that there has been no evidence to show that the State of New Jersey ever has claimed the title to be in her. It may be admitted that the proprietors of West New Jersey did assert a right by the acceptance and approval of the survey. But they did so, in their own behalf, adversely to the State, under a claim which is now settled to have been unfounded.

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Title of Mr. Humphrey considered.

Act of 1831 don't assert a title in New Jersey.

In the recital, however, there is a statement entitled to some attention, in connexion with a part of the charge of his Honour the late Judge Baldwin, in the

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ejectment tried in the Circuit Court for the District of New Jersey. The recital is, that, by virtue of the survey, "Edward Hall and Clement Hall became seized and possessed," and that, by divers mesne conveyances, Henry Gale "hath become seized and possessed." The natural and the legal import of this language is only this, that the constructive legal possession of vacant land follows the right, and it must be admitted that, if the survey had given the right, he would have been, in this sense, in possession. But the proprietors themselves having no right or possession, could give none to their warrantee.

The Arbitrator, Mr Sergeant's opinion, January 15th 1848.

Act of 1831 don't assert a title in New Jersey.

Judge Baldwin, in the latter part of his charge, comes to the following conclusion: "In the year 1784, this island was surveyed for Edward and Clement Hall on a West Jersey proprietary warrant, under which it was held until their title became vested in the plaintiff. From this time, he stood in place of the West Jersey proprietors, entitled to all their rights by prescription against the crown, against the Penns and the State of New Jersey; and, in his own right, by his possession, such as it was, entitled to the benefit of any limitation which had commenced or begun running from the date of the survey. As there was no adverse possession or claim, his legal seizin or possession continued till his dispossession by the United States in 1815, a period of thirty-one years, which would bar the right of entry of any adverse claimant; and, connected with the general claim of the proprietaries of New Jersey to the islands in the Delaware from 1739, would make the title good by a prescription of seventy-four years of quiet enjoyment, adverse to any right under the deeds of

Title of Mr. Humphrey considered.

the Duke of York to William Penn." He then concludes that the title under Gale is derived from the proprietors and is good, and, as has been seen, adverse to the State of New Jersey. JANUARY 1848.

Unnecessary criticism upon the charge of Judge Baldwin, is forbidden by the respect due to the memory of a learned and able man, who so long filled an eminent judicial station. The several legal principles contained in the paragraph just quoted are neither affirmed nor disaffirmed. Nor is it required to point out the one great errour which vitiates the whole of the charge. It has already been done authoritatively. The case of *Martin vs. Waddell** had not then been decided. The decision since has established a different doctrine from that of Judge Baldwin, upon full discussion and deliberate consideration, and in concurrence with the judgments of the courts of New Jersey, that from 1702, the proprietors never had any right in navigable rivers, and, as there will be occasion to consider more fully hereafter, the right of the State did not come into existence until July 4th 1776. Its origin is thus distinctly marked, being connected with the great publick event of that day, which will never be forgotten, as it was the birth-day of a nation, and registered with an exactness of which there is probably no other example in the annals of the world.

The Arbitrator, Mr. Sergeant's opinion, January 15th 1848.

*16 Peters, 367

Title of Mr. Humphrey considered.

This then leads directly to the inquiry, whether the Delaware river was ever within the charter limits of New Jersey, in that part of it where the Pea Patch island has since grown up. If it were, the right would have become vested in the crown by the surrender of 1702, would have so continued

JANUARY 1848. until July 4th 1776, and then would have passed to the State of New Jersey as a part of her sovereignty, acquired on that day by severing her connexion with Great Britain, and assuming to herself all the powers of Government. The derivation would thus have been from the crown, though not by grant.

The Arbitrator, Mr. Sergeant's opinion, January 15th 1848.

To maintain that the part of the river in controversy was within the charter limits of New Jersey, the counsel for Mr. Humphrey have produced the following deeds and papers: Patent, March 12th 1663–4, from Charles II. King of England, to his brother the Duke of York, his heirs and assigns, for a large tract of territory, including what is now the State of New Jersey, the last boundary of which (now the west boundary of New Jersey) is as follows: "and all the lands from the west side of the Connecticut, to the east side of Delaware bay."

Title of Mr. Humphrey considered.

Lease and release, June 23d and 24th 1664, the Duke of York to John, Lord Berkely, and Sir George Carteret, reciting the grant from the King to the Duke of York, grant and convey "all that tract of land adjacent to New England, and lying and being to the west of Long Island, and Manhitas Island, and bounded on the east part by the main sea, and part by Hudson's river, and hath upon the west Delaware bay or river."

New Jersey by her charter came only to low water on the east side of the Delaware.

Patent, June 29th 1674, Charles II. to the Duke of York, for New Jersey by the same description as before. Between this patent and the former one, New York had surrendered to the Dutch, and it is stated that the people of New Jersey sent deputies to New York, and swore allegiance to the States

General and the Prince of Orange. In February 1674, a treaty of peace was signed between England and the States General, by which New York and New Jersey were restored to the English. This deed is supposed to have been made to remove all doubts which might arise from these occurrences. JANUARY 1848.

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There is no necessity for tracing the conveyances further. The title is regularly derived to the proprietors of East New Jersey, and West New Jersey, between whom the province was held in the portions it had been divided into by a partition theretofore made, and by the lines and boundaries then fixed.

Title of Mr. Humphrey considered.

In 1702, the proprietors of New Jersey surrendered to the crown the powers of government, and thenceforth were only private proprietors.

Returning, then, to the question, whether the Delaware river at the part of it now in controversy was within the charter limits of New Jersey, there can at this time of day be no question. It was not within the grant, and as far as is known, there has never been a dissentient opinion.

New Jersey by her charter came only to low water on the east side of the Delaware.

In 1721, the question was submitted to the law officers of the crown by the Commissioners of Trade and Plantations. The opinion of Robert Raymond, Attorney General, and Philip Yorke, Solicitor General, will be found in the first volume of Chalmers' Opinions.* They say as follows: "We have perused the said clauses," (in the charters of New Jersey and Pennsylvania,) "and have been attended by the agents of the parties who claim the province of Pennsylvania, and their counsel, who laid before us a copy of the letters patent granting the said

*p. 59.

JANUARY 1848. province, and have heard what hath been alleged on both sides; and, upon consideration of the whole matter, are of opinion that no part of Delaware river, or the islands lying therein, are comprised within the granting words of the said letters patent, or of the said annexed extract of the grant of New Jersey; but we conceive the right to the same still remains in the crown." The opinion seems to have been acquiesced in, for there appear to have been no further proceedings before the Commissioners of Trade and Plantations, nor before the King in council, whom the commissioners were sometimes employed to aid in colonial investigations; and if it should be suggested that there were no agents present on the part of New Jersey, the answer is, the question was one and the same as to both, for Pennsylvania was bounded by the Delaware on the east, just as New Jersey was on the west.

The Arbitrator, Mr. Sergeant's opinion, January 15th 1848.

New Jersey by her charter came only to low water on the east side of the Delaware.

Some stress might, perhaps, be laid upon the nature of this opinion, partaking, as it does, of the character of a judicial proceeding, and some, too, upon the names of the eminent men by whom it was given, and the high stations they afterwards adorned. But this is needless. The law of nations furnishes the same rule of decision. Here was the crown owning a large territory on both sides of a navigable river, (for, at the time of the latest of the patents to the Duke of York, neither the grant of the three Lower Counties nor of Pennsylvania, had been issued,) and it makes a conveyance of territory on one side of the river, bounding on, or bounded by, the river. Is the river, or any part of it, included in the grant? This is the very question which came

Title of Mr. Humphrey considered.

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before the Supreme Court of the United States in *Handly's Lessee vs. Anthony*,* in the year 1820. The decision of the court was delivered by C. J. Marshall, that the grantor retains the river within his own domain, and the grantee extends to the river only, and the low water mark is his boundary. The same point was decided, in the same way, by the Supreme Court of New Jersey, in *Arnold vs. Munday*,† in 1821, with only this difference of expression, "the grant is to the edge of the river only," leaving a doubt whether it is a line shifting with the rise and fall of the tide. The same point, as to the limits of New Jersey on the Delaware river and bay, namely, that it was bounded by the low water mark on the west side, was decided by Judge Washington, in *Corfield vs. Coryell*,‡ in 1823; by Judge Baldwin, in *Bennett vs. Boggs*,§ in 1830; and it was approved by him in *Gale's Lessee vs. Behlin*, in 1833–4. It must, therefore, be considered as settled that, by her charter limits, the territory of New Jersey extended only to the low water mark of the Delaware river on the east side, and included no part of the river. It is, accordingly, so considered.

* 5 Wheaton, 375–385.

The Arbitrator, Mr. Sergeant's opinion, January 15th 1848.

† 1 Halsted, 1.

‡ 4 Washington's Circuit Court Reports, 371.

§ Baldwin, 60.

Title of Mr. Humphrey considered.

The States of Pennsylvania and New Jersey, as has been seen, being both bounded by the low water mark on their respective sides, and the river itself belonging to the crown, upon the Declaration of Independence, a new state of things arose. The right of the crown was extinguished, and the river lay vacant, a boundary between them. "When," says Chief Justice Marshall,§ "a great river is the boundary between two nations or States, if the original property is in neither, and there be no con-

§ Handly's Lessee v. Anthony, 5 Wheaton, 375–379.

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vention respecting it, each holds to the middle of the stream." The States of Pennsylvania and New Jersey adopted this rule. In 1783, a compact was made by commissioners mutually chosen, which was ratified by acts of their respective legislatures, in 1785. By this compact, concurrent jurisdiction upon the water was given to both States, with some restrictions not necessary to be detailed; some islands were specifically allotted to each State, probably from motives of convenience; and it was agreed that the rest should belong to the State to which they lay nearest, and that all the islands which should thereafter be formed in the river, should be governed by the same principle. This agreement was limited, southerly, to "where the circular boundary of the State of Delaware toucheth upon the same," (Delaware river.) As between Pennsylvania and New Jersey, this compact was formed upon great deliberation, and with a full knowledge of the subject, as must be believed from the high character of the commissioners on both sides, and is in conformity with the principles afterwards laid down by the Supreme Court of the United States in the case, before cited, of *Handly's Lessee vs. Anthony*.

The Arbitrator, Mr. Sergeant's opinion, January 15th 1848.

Title of Mr. Humphrey considered.

If, then, that part of the river Delaware lying between the States of New Jersey and Delaware, which includes the Pea Patch island, was in the crown on July 4th 1776, "the original property not being in either," it would, on that day, have become vested in the two States. In that case, New Jersey would be entitled to the eastern portion of the river, though not within her charter limits; succeeding to that extent to the rights of the crown, which had

been divested by the Declaration of Independence. Delaware, in the same case, would be entitled to the western portion. Both would commence their right from that day. How the line would be drawn, or whether it would place the island on the side of the one State, or of the other, it is not material to inquire; for the view to be taken renders it unnecessary. JANUARY 1848.

The Arbitrator, Mr. Sergeant's opinion, January 15th 1848.

The question, having already shown that the "original property" was not in New Jersey, is thus reduced to the single inquiry, whether on the eventful day referred to, the right to that part of the river was in the crown of England, or whether the "original property" was not in the province or colony which then became the State of Delaware The "original property" of Delaware, that is, her title previously acquired and continued up to that day, becomes, therefore, the subject of examination, and has been accordingly examined, carefully and deliberately. The evidence, as far as necessary, will now be stated.

Title of the United States considered

The title begins with two deeds of August 24th 1682, commonly termed the deeds of feoffment, from James, Duke of York, to William Penn. The first of these deeds grants and conveys to Mr. Penn, his heirs and assigns forever, as follows: "all that the town of New Castle, otherwise called Delaware, and all that tract of land lying within the compass or circle of twelve miles about the same, situate lying and being upon the river Delaware, and all islands in the said river Delaware, and the said river and soil thereof, lying north of the southernmost part of the said circle of twelve miles about the said town."

JANUARY 1848. The deed then covenants for further assurance, and appoints John Moll, Esquire, and Ephraim Herman, gentleman, his attorneys, jointly and severally, to enter into and take possession and seizin of the premises, and to deliver possession and seizin to Mr. Penn, his heirs and assigns.

The Arbitrator, Mr Sergeant's opinion, January 15th 1848.

The second of these deeds conveys to Mr. Penn all the territory from the south line of the preceding deed, that is, from "twelve miles south of New Castle, and extending south to Capin Lopin," meaning Cape Henlopen. In this deed, there is no grant of "islands in the said river Delaware, and the said river and soil threof."

Deeds of August 24th, 1682.

These two deeds, it will be perceived, embrace the whole of the territory of what were called the "three Lower Counties," now the State of Delaware.

Livery of seizin delivered Oct. 28th, and Nov. 7th 1682.

On October 28th 1682, the attorneys appointed in the deeds of the Duke of York, made livery of seizin to Mr. Penn of the first of the tracts, of which a record is made and is still preserved, and is, in all respects, exact and particular. On November 7th 1682, as also appears of record, livery was made of the tract in the second grant to Captain William Markham, Mr. Penn's attorney. The declaration is signed by twelve witnesses, "in Delaware river," probably on their passage up from below the twelve miles. Of both a record was made, and still remains, in all respects exact and particular.

There is this remarkable difference in respect to the two grants; that, in the first, the livery is stated, besides "twig and turf," to be of "water and fowl

of the river Delaware;" in the other, it is of "the land, soil and premises" in the indenture mentioned. JANUARY 1848.

They state, also, that Mr. Penn remained in quiet possession. John Moll, the attorney appointed by the Duke of York to deliver seizin, in his certificate, also recorded, is still more precise. Of the livery, under the first deed, he says, they did give and surrender to the said W. Penn. Esq. actual and peaceable possession of the fort at New Castle, by giving him the key thereof, to lock upon himself the door; which being opened by himself again, "we did deliver also unto him one turf, with a twig upon it, *a porringer, with river water, and soil*, in part of all what was specified in the said indenture," &c. As to the other, he says that a few days after, they went to the south side of Apoquiniming creek, by computation beyond the twelve miles, and there made livery of seizin of the lower part. The distinction thus made, it may be necessary hereafter to refer to.

The Arbitrator, Mr. Sergeant's opinion, January 15th 1848.

Livery of seizin delivered Oct. 28th, and Nov. 7th 1682.

From a book kept in the government at New York, begun in 1682 and ending in 1683, a copy has been produced of an entry or paper, of course made during that period, from the commander and council, beginning thus: "The record of the commander and council; declaration on Esquire Penn's grant for New Castle, St. Jones and Whorekills, by the commander and chief, in council." It then proceeds to recite the two deeds from the Duke of York to Mr. Penn, of August 24th 1682, setting out, at large, and accurately, the description in each; states the appointment of attorneys to deliver free and actual possession, and adds: "as by the said inden-

Penn's title confirmed by the Government at New York 1682-3.

JANUARY 1848. tures here produced, and shown to us, and by us well approved and entered in the publick records of this province, doth and may more at large appear; and we being thereby fully satisfied of the said William Penn's right to the possession and enjoyment of the premises." The paper which is addressed "to the several justices of the peace, magistrates and other officers, at New Castle, Saint Jones, Deale, also Whorekill, at Delaware," or within any of the bounds and limits above mentioned; and then after thanking them for their good service, during the time they had remained under his royal highness' government, dismiss them, "expecting no further account than that you readily submit and yield all due obedience and conformity to the powers granted to the said William Penn, in and by the said indentures, in the performance of which we wish you all happiness."

The Arbitrator, Mr. Sergeant's opinion, January 15th 1848.

Penn's title confirmed by the Government at New York 1682.

John Moll, in the certificate before mentioned, after stating the livery of seizin already referred to, adds this statement: "Which acting of us was fully accepted and well approved by Anthony Brockhold, then commander in chief, and his council at New York, as appears by their declaration, bearing date November 21st 1682, from which jurisdiction we had our dependence all along, ever since the conquest, until we had made the above related delivery unto Governour William Penn, by virtue of his royal highness's order and commands."

Oath of allegiance to Penn, Oct. 28th 1682.

On October 28th, 1682, as appears from evidence of record, sundry inhabitants of the town of New Castle, upon Delaware river, having heard the first

of the two deeds read, and having seen the possession delivered by the Duke of York's agents, "whereby we are made subjects under the King to the said William Penn," make a solemn promise, in the presence of God, to yield him obedience, and to live quietly and peaceably under his government. Soon after, an act of naturalization was passed. JANUARY 1848.

The Arbitrator, Mr. Sergeant's opinion, January 15th 1848.

The objection to these two deeds, however, is, that the Duke of York himself had, at that time, no grant for the premises from the crown, and therefore had no title to convey. It is certain that no such grant has been produced, and it is assumed, as a fact, that no formal grant had been made to him by the crown. But, if the question were open, there would be grounds for believing that the Duke of York was some how empowered to deal with the territory on the west side of the Delaware river, and the river itslf, as connected with the operations he was conducting to protect or recover it from the Dutch. Not that being a subject, he could acquire any right for himself by conquest, which cannot be pretended, but that in such a war, for enabling him to quiet the inhabitants, or strengthening the defence of the country, it was not unnatural nor unreasonable to suppose that he might be entrusted with a large discretionary power, and even with rights in himself for its better execution, especially considering the relation he stood in to the King, and that he was himself the heir presumptive to the crown. John Moll says, they always "had their dependence from the jurisdiction of New York," which was the Duke of York's government, and it was by that jurisdiction we have seen that the actual transfer of the powers

Duke of York's original right west of the Delaware, August 24th 1682.

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of government was made to William Penn, which he began immediately to exercise. There is other evidence to the same effect. The Duke of York and his governours did make grants along the Delaware, and did confirm titles derived from the Dutch and Swedes. There are instances of titles beginning with the Swedes, confirmed by the Dutch, afterwards confirmed by the Duke of York and his officers, and always treated with respect. But there is another transaction of those times, of publick notoriety, more important than any of these, not only on account of its magnitude, but also for the judicial interpretation it has received. In 1681, William Penn obtained his charter for the province of Pennsylvania, bounded on the east by Delaware river, from twelve miles north of New Castle town, and on the south by a circle drawn twelve miles north of New Castle. On August 21st 1682, the Duke of York gave him a release of all his claim upon the province. In the recital it is stated that he "is willing and pleased to confirm and make any further assurance of the said tract of land and premises unto the said William Penn and his heirs." This deed has always been deemed a part of William Penn's title; and, furthermore, it has been held that he took subject to grants previously made or confirmed by the Duke of York's government. The Swedes held a large body of land immediately below the City of Philadelphia. The titles derived from them are still respected. They owned also the land now occupied by the City of Philadelphia. William Penn obtained it from them by exchanging lands on the Schuylkill. And yet there was no formal grant from the crown to the Duke of York.

The Arbitrator, Mr. Sergeant's opinion. January 15th 1848.

Duke of York's original right west of the Delaware, August 24th 1682.

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But it is unnecessary, for a reason that will presently appear, to pursue this inquiry further. Perhaps, indeed, the Duke of York, by subsequently accepting a patent from the crown, and those deriving from him, if they claim under that patent, must be deemed to be concluded by it from setting up any prior title in the Duke of York.

The Arbitrator, Mr. Sergeant's opinion, January 15th 1848.

Be that as it may, the important fact deduced from what has been stated, and leading to consequences in law which will be more fully developed as the history advances, is this: that it was under these deeds, by the description and boundaries contained in them, and none other, and with the possession and seizin then delivered, that the three Lower Counties became, at least *de facto*, a province or colony, and acquired a name and identity which they maintained thenceforward for a century, less only six years, and then, of their own will, exchanged for the higher title of a sovereign and independent State. The same community still exists after nearly three quarters of a century more, with only such modifications as it has chosen to make in the mode of its existence, and as it rightfully might make, but still preserving its identity as the same corporate body which first had its being in the year 1682. The province was, and always continued to be, an unit.

The act of Union in 1682, confirmed the Penn title.

Immediately after, the freemen began their work of government by acts of legislation. The first act (7th December 1682) was the "Act of Union." In the volume of laws referred to, this act is immediately preceded by the two deeds from the Duke of York to Mr. Penn, set out at large. The preamble recites the patent for Pennsylvania, and the release

JANUARY 1848. from the Duke of York. It then goes on to set forth the two deeds from the Duke of York for the three Lower Counties, giving in full, and accurately, the description in each, and especially in the first, the words "as also the said river of Delaware, and soil thereof, and islands therein;" and states that the freemen of those counties have desired to be annexed to Pennsylvania. The enacting part follows, providing for the Union, and for the naturalization of such of the inhabitants as were foreigners. Then follow sundry other acts of legislation in the same year, constituting the body of laws well known by the name of "the Great Law." They profess to be enacted by the deputies of the freemen of the province (Pennsylvania) and the counties aforesaid (the three Lower Counties.) The legislature was, indeed, constituted of equal numbers from the province and counties. To understand the whole bearing of this evidence, it must now be remembered that these laws were to be transmitted and delivered to the privy council in England, and, if disapproved by the crown within six months from the delivery, and so declared, were to become void; otherwise, to remain and stand in full force, "according to the true intent and meaning thereof." The "Act of Union" was, of course, submitted to the council, and approved by the crown. Looking at the recital and enactments of that act, and its preamble, it is impossible to avoid saying that the crown assented to them, thus acknowledging the validity and legal operation of the two deeds from the Duke of York, the boundaries defined in them, the possession and right of possession according to those boundaries, and the

The Arbitrator, Mr. Sergeant's opinion, January 15th 1848.

The act of Union in 1682, confirmed the Penn title.

rightful exercise of the powers of government under them. An existing colony was thus acknowledged as rightfully created, and lawfully enjoying the powers and privileges of a colony by known and settled boundaries; and this acknowledgment was by all who had an interest. New Jersey had none, Pennsylvania had none, the Duke of York had none. The new province encroached upon none of them; Lord Baltimore asserted a claim on the land, but it was afterwards decided to be unfounded. The crown alone could object, and the crown assented. This assent, let it also be borne in mind, was not an informal and hasty one, nor upon insufficient knowledge. The King was in the exercise of his royal power, was aided by his privy council, and had full information before him of all the facts necessary to enable him to understand what he was doing. That he could, if so minded, have retracted his assent, it would be difficult to maintain. But he never did retract his assent, nor intimate any disposition to do so.

January 1848.

The Arbitrator, Mr. Sergeant's opinion, January 15th 1848.

On March 22d 1682–3, Charles II. made a grant by patent to James, Duke of York, of the same premises which had about seven months before been conveyed by the Duke of York to Mr. Penn. This deed in its description is the same as in the two deeds of August 24th 1682. It describes separately and grants separately, the two parts of the Lower Counties as in those deeds. The only difference is, that in the former, there are two instruments; in the latter, only one.

The original patent was here produced—brought

JANUARY 1848. from England some years ago by the late J. R. Coates, Esq. (who was an agent of the Penns,) where it was given to him by John Penn, Esq. a lineal descendant of William Penn, from among the title papers of the Penn family; rather, it was understood as a thing no longer of use to him, which might gratify curiosity in Pennsylvania and Delaware, than for any other purpose. At Mr. Coates's death it went into the hands of J. G. Morris, Esq. who has carefully preserved it, and now comes to us from the possession of Mr. Penn, with a presumption that it has been there accompanying his possession as a part of his title.

The Arbitrator, Mr Sergeant's opinion, January 15th 1848.

Of this deed there have also been produced various exemplifications; one from the rolls in England, one from the records in Delaware, a copy, sworn to be a copy, before the Lord Mayor of London, in 1735, and perhaps others. It is referred to, also, in the Votes of the Assembly. The original, or a sworn copy or exemplification of it was an exhibit accompanying the bill of the complainants in the case of *Penn vs. Lord Baltimore*, filed in the high Court of Chancery of England, in the year 1735, and was in evidence in that case, and the original was offered to be, and probably was, produced.

Penn's title completed afterwards by letters patent from Charles II. 1682-3.

If this deed had preceded the deeds of the Duke of York, the regular derivation of the title from the crown to the Lower Counties could not have been disputed, and there would have been no question open but upon the construction of the terms of the patent, as to what was conveyed. But above a century ago, in the case just cited of *Penn vs. Lord*

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Baltimore, the defendant set up the argument against the Penns, supposed to be derived from this order of the instruments, "that the grant to the Duke being made after the deed by the Duke to Penn, this grant must have been for the Duke's use, and not for Penn's." The answer on the other side was, "We have a fact that will determine that case; for we have the very original charter itself, under the great seal, in our custody, ready to produce, which if the Duke had intended for himself, and to defeat our title by, he would have kept, and not Mr. Penn, who was at this time of passing it, and for a considerable time longer, over in America." These things are gathered from a large folio printed book, (belonging to Thomas Gilpin, Esq.) produced on the part of the United States, which contains the pleadings and evidence in the case, and is called in the statement "The Breviate." The case was decided by Lord Hardwicke, in 1750, and is reported in 1 Vezey, 444. As the decision is deemed to be of great weight in every aspect, and made a final end of all controversy in England, (for there never has been a dispute since,) and thus fixes a new epoch in the history of the province, it will be conducive to the right understanding of its proper bearing upon the immediate subject of controversy, to look back upon the earlier evidence which has been produced upon the hearing of the present case.

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Penn's title completed afterwards by letters patent from Charles II. 1682-3.

The foundation of the new province upon the basis of the deeds from the Duke of York, the exercise of legislative power, the declaration of allegiance in New Castle, and the union with the Province of Pennsylvania, all approved by the crown of England,

JANUARY 1848. have already been seen. The union appears to have been only a sort of league, betraying a want of cordiality in the beginning, and leading very soon to uneasiness and dissatisfaction; and after a few years of restlessness and irritation, they finally separated, with Mr. Penn's consent, in 1703. In the following year an attempt was made to bring them together again, and the people of the Lower Counties would appear to have been willing; but the people of Pennsylvania would not consent. From 1703, therefore, they became separate provinces, to all intents and purposes, (except that the government powers and right of property in both were in Mr. Penn,) and so continued till the revolution. In this respect Judge Baldwin was misinformed, and supposed the union to have remained uninterrupted.

The Arbitrator, Mr. Sergeant's opinion, January 15th 1848.

Very soon after the deeds, Lord Baltimore set up a claim to a large part of Pennsylvania, and to the whole of the Lower Counties, quite to the Delaware river, upon the allegation that they were embraced in his patent. In 1685, the council, to whom the jurisdiction belonged, decided against him, directing a line to be run north and south, which is the present western line of the State of Delaware. Soon after, an agreement was entered into between Mr. Penn and Lord Baltimore, for settling all disputes between them.

In 1692, Mr. Penn was removed from his government, and Benjamin Fletcher was appointed by the crown. The alleged ground for this measure was, that disorder had occurred in his government. There was no question about title, nor was either province

Recognized by William and Mary, 1694.

disturbed. They went on as before. In 1694, Mr. Penn was restored, and the government descended to his children. There has been a very general belief, that the real offence of Mr. Penn was his supposed regard for the Stuart family, and particularly for James II. then banished from the throne and kingdom. JANUARY 1848.

The Arbitrator, Mr. Sergeant's opinion, January 15th 1848.

In and about the year 1711–12, a surrender of his government powers to the crown was contemplated by Mr. Penn, and it is understood that a negotiation for the purpose was considerably advanced, when his capacity to proceed further was arrested by illness, which prostrated his mind and memory for the remainder of his life. Pending the treaty, the crown consulted the Attorney General, Edward Northey, and his opinion, as reported by him, is in Chalmers' collection,* dated February 25th 1711–12. Mr. Northey, among other things, says, "and he has made out to me his title thereto," that is, to the government of Pennsylvania, and of the "town or colony of New Castle, alias Delaware." This was in the time of Queen Anne.

By Attorney General, temp. Queen Anne.

*Vol 1, p. 32.

In 1717, the Earl of Sutherland, alleging that he was a creditor of the crown to the amount of £20,000, applied for a grant of the three Lower Counties. It was referred to the Attorney and Solicitor General, Edward Northey, before mentioned, and W. Thompson. They made an elaborate report, which is published by Chalmers,† dated October 28th 1717. They heard the parties, who were before them—the Earl of Sutherland on one side, and on the other, "Mr. Penn's mortgagees and other purchasers under him."

†id. p. 39.

JANUARY 1848. Mr. Penn took no part. They state, also, that no deed from the crown was produced. For both these things they give a very sufficient reason, when they say,* "but they presume the said late Duke of York might have some other grants thereof, which Mr. Penn might give an account of, but cannot, '*being under a lunacy.*'." Mr. Penn died in the following year, 1718. They conclude their report by submitting for consideration, "whether it will not be reasonable that your Majesty's title should be established by the Court of Chancery, before any grant should be made of the premises." This was in the reign of George I. The application does not seem to have been further pursued, nor was any use made of the hint about chancery on that application. The title, therefore, passed undisturbed by the crown, through five reigns and a revolution, and the province continued as it was founded in 1682, though it was always in view of the authorities of England, and as has been seen, frequently subjected to the examination of the King's legal advisers.

* p. 45.

The Arbitrator, Mr. Sergeant's opinion, January 15th 1848.

Unquestioned by George I.

In 1735, William Penn being dead, a bill was filed in the high Court of Chancery, in England, by John Penn, Thomas Penn and Richard Penn, his sons, against Charles Calvert, Lord Baltimore, to enforce the performance of the agreement made in the preceding century, for fixing the boundaries between Pennsylvania and Maryland, and between Maryland and the Lower Counties. Recurring now to the advice of Mr. Northey and Mr. Thompson to the crown, to have the question of title determined in Chancery, there is no reason to doubt that this suit was allowed, if not directed, by the privy council

"It is certain," says Lord Hardwicke, replying to an objection to his jurisdiction, "that the original jurisdiction in cases of this kind, relating to boundaries between provinces, the dominion, and proprietary government, is in the King and council." "The King, in council, is the proper judge of the original right." He adds, that the King, in council, might look upon the agreement, and allow it as evidence of the original right, but he could not decree it as an agreement. "And therefore," he says, "the lords of the council have remitted this matter, very properly, to be determined in another place, on the foot of the contract." Lord Hardwicke was well aware of the questions to be decided finally in this case, as appears in the striking exordium of his judgment, "it being for the determination of the right and boundaries of two great provincial governments and of three counties, of a nature worthy of the judicature of a Roman senate, rather than a single judge;" adding, "and my consolation is, that, if I should err in my judgment, there is a judicature equal in dignity to a Roman senate, that will correct it."* No appeal was ever taken to the House of Lords.

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The Arbitrator, Mr. Sergeant's opinion, January 19th 1848.

Penn v. Baltimore, probably directed by the Privy Council.

* 1 Vesey, Sr. 444-5.

In the decree, liberty was reserved to either party to apply to the court, if, by "any act or right of the crown," execution of it should be obstructed. This liberty was never used. No act or right of the crown was interposed.

One of the objections, among many, made by Lord Baltimore, was upon the order of the deeds—that is, that the deed to the Duke of York was subsequent to his two feoffments. Lord Hardwicke lays aside the doctrine of estoppel, evidently not because it was

The Letters Patent of 1683 made title by estoppel.

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inapplicable or insufficient in law for answering the objection, but because the expression of it was unnecessary, and perhaps inconsistent with the deference due to the crown. What his opinion was, is evident enough; for he says, "the Duke being in the nature of a common person, was in a condition to be estopped." Being liberated from the restraints of the Lord Chancellor, we are at liberty to say, that the Duke, at the date of the deeds, being a subject, was, in this respect, only "a common person," and as much bound by estoppel as any other subject. He did not succeed to the throne till two years after. Admitting it to be true (which cannot be admitted for reasons it would take too much time now to enter into) that the King is not bound by estoppel, it would be an unreasonable and most unjust stretch of the prerogative to suppose that, when a man ascends the throne, he is liberated from all estoppels he had previously incurred as a private person. It might as well be contended that he is freed from all grants he had previously made; for the real equity of an estoppel, in such a case as this, is neither more nor less than to make the two deeds operate as one grant, and thus do plain justice between the parties. It is no subtlety nor refinement of law, but the natural dictate of common sense and common honesty. There may, perhaps, be instances of estoppel, such as from recitals and the like, which would affect a private man, and do not touch the King; and, on this account, what is now said is limited to the very case in question. The conclusion is, that the deed of 1683 was an estoppel.

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The Letters Patent of 1683 made title by estoppel.

But there is another answer to the objection which

satisfied Lord Hardwicke, and is fully satisfactory. If there were no estoppel, and the deed of 1683 vested the legal right in the Duke of York, where it remained when he became King, he was a trustee, a royal trustee, and the equity would be in Mr. Penn, or in the people of the province, it matters not which. That the King can be a trustee, would seem to be settled, whatever may have been formerly thought from a supposed analogy to the doctrine of uses. Lord Hardwicke is authority for this, in *Penn vs. Lord Baltimore.** So is the *Earl of Kildare vs. Eustace.*† So is *Burgess vs. Wheate.*‡ Trusts have, in equity, a sort of independent existence for their own preservation. With reference to the trustee, actual confidence in the person is not essential. Hence, a corporation may be a trustee, and so may the King. Indeed it is an established maxim of equity, that a trust shall not perish for want of a trustee. The real difficulty, in the case of the King, is about the remedy. "The arms of equity," says Lord Northington, in *Burgess vs. Wheate*, "are very short against the prerogative." Chancery, the appropriate forum of trusts, is without power, because it is said "it has no jurisdiction over the King's conscience: for that it is a power delegated by the King to the Chancellor to exercise the King's equitable authority betwixt subject and subject." So said by counsel in *Pawlett vs. Attorney General.*§ Hence, the caution of Lord Hardwicke, in *Penn vs. Lord Baltimore*, "I will not decree a trust against the crown in this court," though he did not hesitate to declare his opinion that the King was a royal trustee. The right of the cestui que trust, however,

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If not, then they created, a trust for Penn.

*1 Vesey, Sr. 444

†1 Vernon, 439.

‡1 Eden, 223.

§ Hardres, 468.

JANUARY 1848. is not questioned; nor is it questionable. There has been a suggestion that, in such cases, perhaps relief might be obtained through the exchequer, and the subject may certainly prefer a petition of right. But that is not material to the present purpose. If the right be established, no remedy is wanted; and that the equity is sufficient to raise a trust is clear, as well from what has been stated, as also from the covenant for further assurance in the deeds of 1682. There was, at all events, therefore, an equitable estate, which is quite as available as a legal estate.

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This decree of Lord Hardwicke settled the validity and legal sufficiency of these deeds, the right of the province under them, and, of course, its boundaries, as described in the deeds. No appeal was taken, nor did either party ever apply, under the reservation in the decrees, to set up any "act or right of the crown." It was universally acquiesced in, and became, by its own force and common consent, the law of the land from that time forth, till the crown of England ceased to have power either to confirm or to dispute the rights about which it was made. Now, this was the same province which had been founded, as we have seen, in 1682; these were the deeds under which it was founded; and these were the boundaries by which it had been defined from the beginning.

Penn v. Baltimore 1 Vesey, Sr. 444, settled Penn's boundaries.

Twenty-four years more elapsed, without controversy or question in England, its boundaries acknowledged by the crown, (the crown, in truth, had never disputed them,) when the delegates from "New Castle, Kent and Sussex, on Delaware," on

Same boundaries existed in 1774.

September 5th 1774, met the delegates from the "several colonies and provinces in North America, assembled at the Carpenter's Hall, in the City of Philadelphia.* New Jersey had also delegates there, and so had Pennsylvania and Maryland, all immediate neighbours, by whom they were bounded. JANUARY 1848.

*Journals of Congress 1774.

As a province or colony they were received, having a definite existence under the crown of England. Such as this province was under the crown of England on that day, such was she acknowledged to be by being received into that Congress. On that day, we have seen this colony's rights under the crown, and her boundaries, which were part of them, had stood the shocks of twenty years of controversy, and finally were settled by a solemn decree in Chancery, and rested securely and quietly upon the foundations laid in 1682. In the struggles and hazards which ensued this province took her full share. On July 4th 1776, she declared herself a sovereign and independent State, by the name of "Delaware," and by the united efforts of herself and her sister States was enabled to maintain it. But this State was the same that was a feeble colony in 1682, with the same metes and bounds; the same that in her more advanced age had had her metes and bounds judicially established by the high Court of Chancery, and, let it be added, whose boundaries had never been even questioned by the crown from the beginning, but in every way sanctioned. Could such a State, after all this, be called upon to vindicate her original rights? Lord Baltimore had a long controversy with her, because their grants interfered. But it was settled in England before the revolution. The State of

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So that Delaware had same boundaries *de facto*, in 1776 that she had by deeds in 1682.

JANUARY 1848. Maryland has never claimed to revive it. With New Jersey there was no interference, nor is there now. New Jersey has had no controversy with Delaware, and has none at present, so far as is known.

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When Delaware became a State there was no subsisting controversy with any body as to her boundaries. The change which then took place was from the condition of a dependent province of the crown of England to that of an independent sovereign State, achieved by conquest. Allegiance to England was thrown off; the royal rights reserved by charter were ended, and with them the government powers of the proprietaries derived from the crown, and all their incidents. They fell together, at the same time. The blow was not struck at the proprietaries. It was aimed at the crown, and when it took effect there, the subordinate government gave way with the head it depended upon, and ceased to exist. As far as there was any derivation in the case it was, in this sense, from the crown of England; and if there had been (as there was not) an outstanding royal claim of any sort, that, according to *Martin vs. Waddell*, would have instantly become vested in the new sovereignty. From this view it follows, unavoidably, that if the deed from the King to the Duke of York had never existed, but only the two deeds from the Duke of York, still—as the province had been founded under them, had existed upon its original foundation for nearly a century, was *de facto* a province or colony, and received as such into the union of the colonies, and was by them all declared to be a state of the Union, has been so ever since, and still is—it would be very difficult indeed to maintain that

A boundary *de facto* would be enough.

her limits and boundaries were not incontestably proved by those deeds, unless they interfered with some superiour and better right. The *de facto* existence became a legal one, to all intents and purposes, by the affixing of her own sovereign seal, which had superseded the great seal of England, and acquired all its virtue and power. If necessary, this view might be carried even further. A colony or province, without any deed at all, would, under the like circumstances, have become a State; and if, from July 4th 1776, to the present day, she has been, and still is, a State of this Union, with the same rights and privileges as the other States, and there were any authentick document to prove her boundaries, (though not a royal patent or grant,) and they interfered with no other rights, it would be very difficult to impeach her title. But even if the royal consent or recognition were indispensable, it is surely to be found in the treaty of peace, for Delaware as clearly as for any other State. And now, it is proper to remark, that all the arguments urged against her upon the very question to be decided, namely, her rights in the river, the islands, and the soil, however they may profess to be restricted, have one common fault; they go too far; they prove too much. They would take away the whole right of Delaware, land, river, islands, and all. For example, one of the learned counsel has produced the charter or patent to Lord Baltimore, and insisted that it went entirely to the river Delaware. If so, and it is in force now, the whole territory of Delaware on the main land would be taken away, and nothing left but the river right, if, indeed, that could stand alone. Whereas,

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Even without any deed at all.

Royal assent, if necessary, was given by treaty of peace.

JANUARY 1848. as has been shown, the right between them was decided in council, November 13th 1685, by fixing the present line; they entered into an agreement between them in conformity, and the specifick performance of that agreement was decreed in Chancery in 1750. The original right has never been open since. Judge Baldwin, on the other hand, allows her title to the main land to be good by possession, which, it is respectfully submitted, is a low and precarious ground to place the title of a State upon; but he seems to deny any right but possession, and altogether to deny it as to things which were not of a nature to be actually possessed. These objections are now too late, if they ever had any foundation at all. They were long ago decided and settled in England. They were decided and settled at the revolution; and, as to her boundaries, they stood defined and authenticated in the deeds of the Duke of York, in the patent of the King, in the proceedings of council, and in the high Court of Chancery, never having undergone a change from what they were at the beginning.

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This course of observation, however, must here be suspended for a moment to examine the construction of the deeds, as respects the immediate question upon original grounds, lest it might be supposed that they were doubtful or insufficient, or stood in need of aid, to give them a meaning they do not of themselves properly import. Upon a careful and deliberate consideration of the whole subject, and of the arguments urged against the right of Delaware, it is believed that the deeds are quite clear. The question is, did the boundaries of the province go into the Delaware

Meaning of Duke of York's deeds to Penn declared.

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within the twelve miles circle, or did they not? The first great rule in regard to such inquiries is, that there is to be no interpretation where there is nothing that requires to be interpreted. If the words be clear in themselves, they are to be accepted. "Words," says Rutherforth,* "are the common signs that mankind make use of to declare their intention to one another; and when the words of a man express his meaning plainly, distinctly, and perfectly, we have no occasion to have recourse to any other means of interpretation." And for this he cites the support of Grotius.† This is the same rule that is laid down by Blackstone.‡ They all agree, too, that words are to be taken in their most usual and known signification; and technical terms and terms of art, according to the interpretation of the learned in each art, trade, or science. And how can it be otherwise? Words make contracts between parties, which are to be understood in one sense by both. How can that be, unless there be a standard to be resorted to, as nearly fixed as possible, especially, in the more important transactions of life? Now, if with this single rule, any man, learned or unlearned, will read the Duke of York's deed for the upper part of the province, and that part of the King's deed which is for the same, he will be at no loss to say what it is that they grant. They are the appropriate legal words for the purpose, and evidently used skilfully and upon deliberation, and with comparatively accurate knowledge, for the New Jersey grant and the grant to Lord Baltimore, and the charter of Pennsylvania, were all prior, and there had been a long contest with the Dutch and Swedes, who had settlements and forts on the west side of the Delaware river, from Cape Henlopen to

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*Inst. Nat. Law, Bk. ii. ch. 7, § 2.

†Bk. ii. ch. 16, § 1.

‡1 Commentaries, 59.

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the north line of the City of Philadelphia, where they had been in possession for nearly sixty years. Two of the principal were within the twelve miles circle; that is, one at New Castle and one at the mouth of the Christiana. Besides, the words employed are the appropriate legal terms for making the grant. When the same subject comes up for judgment, the same terms are employed for describing what was granted, as may be seen in *Martin vs. Waddell*, and *Munday vs. Arnold*. The same terms were used, substantially, in patents and grants which conveyed or intended to convey navigable rivers, as in the patent to the Duke of York, the grant to Lord Berkeley and Sir George Carteret, and from them to the proprietaries of New Jersey. There is still another test. If the object was to grant the river, islands and soil, could any lawyer or conveyancer have devised, or can any one now devise, a better or even as good a form of words to accomplish it? Strike them out, and all the other purposes of the deeds, it is true are effectuated without them. They are thus rendered surplusage. This would be an offence against another established rule of construction, which requires that all the words of an instrument should, if practicable, be allowed to have some sense and operation. But while these words stand, it seems to be impossible that now, after more than a century and a half, any one, and particularly any third person, and, above all, a third person without right, power or interest in the subject matter of the grant at the time it was made, and for nearly a century after, can claim to have them stricken out or disregarded.

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The intimation by Judge Baldwin, in his charge,

that the two grants are to be construed together as that one may control the other, so as to give them the same eastern boundary, with all respect for his learning and ability, cannot be admitted. In a legal estimate, they are not one deed, because they are two deeds; and they are not the same, because they are different. Why were they two, and why should they differ? The grantor so willed it, and he did as he willed, and as he had a right to do, in language evidently framed by learned advisers. They can well stand together, for there is no contradiction between them. If a man were to give estate A. in fee simple, estate B. in fee tail, and estate C. for life or years, it would seem extraordinary to say that he gave the same estate in all.

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Nor is the difficulty overcome when the first step is taken. Admit (if it be possible) that the deeds are thus to be construed, which of them is to have the controlling power? the one that carries the boundary over to the low water mark, on the Jersey shore, or the one that stops at the low water mark on the Delaware side? It is apprehended that there is no legal principle to aid in deciding that question, and that in the apparent search for reasons, we should find ourselves in the region of fancy and imagination. Of what consequence can it be what were the reasons of the King and the Duke of York, or whether they had any reasons at all? Their will decided them to give what was their own, and they had a right to give. If they were not deceived in the grant, (as certainly there is no reason to believe they were,) it is wholly immaterial whether the act commended itself to other men's reason or not; whether it was

JANUARY 1848. wise or unwise. Neither of them has had much credit with posterity for wisdom. But this act has never been imputed to them as a crime or folly. In the most sober judgment, it must rather be deemed reasonable and meritorious. The three Lower Counties, at New Castle, had a width on the land of but twelve miles, being cut off to the westward by the line between them and Lord Baltimore. They had no great navigable rivers. That line, probably running upon the summit between the Delaware and Chesapeake, where the heads of the streams were turned in opposite directions, probably left them no water communication with that great estuary and its tributaries. Their neighbours, New Jersey, Pennsylvania and Maryland, all with extensive territories on the land, abounded also in great navigable rivers within their limits. Was it then, it may be inquired, so unreasonable to allot them, as a part of their possession, a little addition to their width, by giving them a part of the river, reserving only the publick rights (navigation for instance) which were free and common to every subject, and now are to every citizen of the United States? Was it so unreasonable as of itself to condemn the grant, and compel a construction against the clear words to secure its condemnation? From the circle downwards, the breadth of the land increased, and did not so much demand enlargement. Besides, at the southern point where the circle strikes the water, the river begins to widen rapidly and becomes the bay, which there might be good reasons for not granting. There is nothing which seems at all unreasonable in the grant. It was made to freemen, capable of holding and

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enjoying it, of transmitting it to their descendants, who, in due time, asserted and maintained their right to independence; and in the conflict which ensued, and in all the duties of its more intimate union with the other States under the Constitution, Delaware has contributed its full proportion of what was required for the publick welfare and honour. So has New Jersey. In this respect they are equal. But who can say that it was more unreasonable or less conducive to the well being and happiness of our country, or of mankind, that it should have fallen to the lot of Delaware rather than of New Jersey, or been left to be equally divided between them?

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But this can hardly be called legal argument. There is too much in it that is apart from the real question. What is the construction of the grant? Is it in any respect wrongful? These are the true questions. Both are believed to be with the State of Delaware.

Returning to the point digressed from, when the question of construction of the deeds was taken up, it is only necessary to observe that the colony of the three Lower Counties having been received into the Congress, became in due time a State. This was a great change. But, great as it was, it was the whole change. No one ever thought that by becoming a State, the territorial rights and possessions previously belonging to it, were reduced or altered. Where was there a power to do either? Not, surely, in any other State. As surely, not in the Congress of the United States; and these two descriptions embrace the whole circle of acknowledged authority. When the charters of some of the States were found to

As a State, Delaware had her colonial boundary; and the territory is in Delaware.

JANUARY 1848. include large masses of vacant land, which might be dangerous to the peace of the Union, did Congress, or either or all of the States, attempt to define or limit their boundaries? Congress invited them to make cessions, which they freely and patriotically did, by compact, and with the conditions they thought fit to insist upon and Congress to accept. The Declaration of Independence, from the day it was made, is thenceforth the title of every State.

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What remains, then, to be considered, may be embraced in this general inquiry: Has the State of Delaware, by any act or default of her own, parted with or lost the right she then had, or any part of it?

Did she ever part with her original rights.

The examination of this question must, however, be preceded by an observation no one will refuse his assent to, which, nevertheless, when fairly carried out, will be found to meet and conclusively to answer most, if not all, the objections alleged to the title of the United States, derived from the State of Delaware. It is this: that the inquiry is to be understood as applied to a sovereign State, with all the attributes of sovereignty, except such as have been yielded to the United States. Whoever would claim from her, or would claim against her, must, therefore, make out such a case as will be available against a sovereign. More clearly must it be so, if the claim be to take from her a portion of her territory, and a part of her boundaries; not to come in under her and be one of her community, but to transfer them to an alien jurisdiction; in other words, to make them part and parcel of another State. Such is the claim made by Mr. Humphrey. The right he asserts is not under the State of Delaware, but adverse to her.

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As long as the discussion was upon the boundaries of the respective States, every argument which conduces to show the right to be in one rather than the other, is fairly applicable and entitled to respectful attention, which they have accordingly received. But the moment that point is settled, and the boundaries established, all within the line on the respective sides is part of the territory of the one it is adjudged to, and it is subject to her exclusive sovereign jurisdiction. To her alone belongs the rightful power to govern and make laws for it, without interference by the United States, or by any State. That there was a dispute about boundaries, was a good reason for settling it; but none for holding it less the territory of the State after the dispute is settled, than any other part of her possessions. No one, for example, would affirm that what fell into Maryland or Delaware by fixing the line between them, or into Pennsylvania or Maryland, or into Pennsylvania or Virginia, by fixing their lines, is less within their jurisdiction than any other portion of the territories of these States. Wherever their limits are, up to that line, their law making power extends and governs. This principle, believed to be undeniable, applies in full force to the present case. If it has been necessary, for the purpose of deciding the controversy about the Pea Patch, to determine, incidentally, the question of the boundaries of the two States at that part of the river, (and it has been so argued on both sides,) and it has been determined that the island is within the territory of Delaware, it must follow that the island is also within her sovereignty; and whoever puts his foot upon it, is subject to her laws just as much

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If so, it must have been by her own sovereign act.

JANUARY 1848. as if he resided in New Castle or in Wilmington. Whoever would seek to recover it at law, must go into her courts, including in that description the Circuit Court of the United States, where there are proper parties; a court established for administering the laws of the State, in civil cases, where one of the parties is an alien, &c. of another State, or otherwise entitled to the aid of an United States tribunal; but still to administer those laws. In regard to the Pea Patch, there has been a conflict of jurisdiction. Dr. Gale brought an ejectment in the Circuit Court of the United States for the District of New Jersey, recovered a judgment, and obtained an execution. The United States brought an ejectment in the District of Delaware, got a judgment, issued an execution, and the Marshal of Delaware was authorized to turn out those whom the Marshal of New Jersey had been authorized to put in. Records of both were produced. Both were necessarily disregarded as affecting the question now under consideration. The only thing certain about them was, that both could not have jurisdiction; and which of them had, depended upon exactly the same point as the present case turns upon, namely: whether the island was in New Jersey or Delaware. And it may also be remarked, that in one of them (Delaware) the judgment was by default; in the other, it was upon a trial essentially ex-parte, with a very imperfect exhibition of evidence, by no means to be compared with what has been produced in this arbitration.

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Has Mr. Humphrey acquired the island from Delaware?

Considering it to be established that the island is within the limits of Delaware, Mr. Humphrey is to make out a title to it in one of two ways: by showing

that he has himself acquired it, in which case he must show that his acquisition of it has been under or according to the laws of Delaware; or that New Jersey has acquired it, and that her title enures to his use. JANUARY 1848.

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As to the first, nothing has been alleged but possession. By the laws of Delaware, possession does not avail against the State. The statute of limitation, between individuals, is truly said to be a law of peace. An exception to it, in favour of States, or a considerable extension of time in their behalf, may be as truly said to be a law of necessity; for States cannot occupy, as individuals, so as to have an actual manifest possession, which is notice; nor can they apply the same vigilance which is reasonably required of private proprietors. It is not necessary to dwell on this. Actual possession there has not been. His Honour, the late Judge Baldwin, says, that by the survey of 1784, and its acceptance by the proprietaries, the Messrs. Hall, and Dr. Gale under them, stood in the place of the West New Jersey proprietaries, with all their rights. "His legal seizin or possession," continued for thirty-one years, till 1815, would bar the right of entry of any adverse claimant. Had the right been in the proprietaries, and the island within New Jersey, the legal seizin or possession, as before stated, would have accompanied the grant. But neither part of the postulate is correct. The proprietaries had no right, as has been seen, and the island was not within New Jersey. When Dr. Gale, or some one claiming under him, obtained the title of the State, in 1831, he could get no legal seizin, for one of the reasons

Adverse possession would not avail, if there had been any.

Whether legal,

JANUARY 1848. already stated; and for this additional one, that the United States were then in actual adverse possession.

Thus, then, there was no legal seizin or possession. That there was no actual possession under the survey, worthy to be so called, or to found a right upon, seems to be an unavoidable inference from the evidence. The survey could not have been made on the ground. Its date, 1784, is near the time when the island was about the size of "a man's hat," and overflowed every high tide. There was no resting place upon it for the surveyor's foot or his instrument. But there is something else, much more conclusive. The surveyor returns the contents to be 178 acres. More than fifty years afterwards, when the island had been growing all the time, it contained by accurate measurement, only 87.60 acres. The surveyor, therefore, did not begin a possession, though he made a sufficient survey if the proprietaries accepted it, as they certainly did. No survey, indeed, was necessary, for an island is sufficiently defined by the waters. The only other evidence of possession is, that in the spring of 1813, April or May, Dr. Gale took down a large party of men. The witness who proved it was one of the company. He said they went there to fish, and it was stated that Dr. Gale had in view to make a fishery, but it did not answer, on account of the strength and direction of the currents, which swept the nets into deep water and let the fish escape. They found upon the island a rough frame house, recently erected, (probably by Dr. Gale,) of one story in height, with one room in it, and no chimney or fire-place. They used, for cooking, a stove they carried down in a boat and

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Or actual.

No actual possession by Dr. Gale, from 1784 to 1816.

brought away with them. They left the island in August, and, as far as appears, never returned. What became of the house is not in proof. The occurrence just related was after the military officers of the United States had fixed their attention upon the spot as a site for the defence of the river. About the same time, General Bloomfield, who was in command of the military district, went to Delaware to negotiate a cession of the island to the United States, being himself a citizen of New Jersey, and having been her Governour and ex-officio Chancellor, and it is reasonable to suppose acquainted with her rights. In December 1814, Captain Clarke, of the United States topographical engineers, under orders from the War Department, taking with him one hundred soldiers and some thirty or forty workmen, and the frame of a block house, went upon the island to commence the work of a fortification, and remained there till June 1816. He states that there was nobody on the island when he went there, nor any building or "vestige" of one, and that nobody was there during his stay but those under his command. From the survey, then, until 1816, there was no possession, and from that time the United States have been in possession. The fishing visit of 1813, cannot be called a possession, and if, connected with Dr. Gale's claim of title, it might be so termed for the time, still it was abandoned, leaving no mark of ownership. There was no actual possession, therefore, even if that could have been available. The evidence is that the island was occupied only by crows, selected by them as a lodging place for its solitude and security.

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Nor since 1816, when in the United States.

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Has the State of New Jersey acquired any right under which his claim could be covered? If a case were established, in point of fact, it would be necessary to inquire how such a right could be acquired by New Jersey, the territory in question being within the State of Delaware, and subject to her laws and government. But it does not seem requisite to enter upon that inquiry, inasmuch as the proofs are deemed to have made out no such case.

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Has New Jersey ever acquired the island from Delaware?

The controversy, it will be seen, embraces two descriptions of rights, namely, the river and the soil under it, and islands in the river. The former is not susceptible of actual possession—the latter are. To begin with the latter. The evidence is, that within the twelve miles circle, before the Pea Patch made its appearance, there were only two islands, (so called,) Reedy island and Bombay Hook. They have both been in the possession and under the jurisdiction of Delaware. Bombay Hook, it is believed, cannot with propriety be called an island in the river. It lies within the line of the main land of Delaware, above the low water mark of the river, and has been surrounded by water only by reason of an artificial outlet being cut for Duck creek into the bay. There remains then, only Reedy island. It may be said that it lies nearest to the Delaware shore. But it was in the river, and if the right to the river and islands was in the crown, while Delaware was a province, Delaware could have no right in Reedy island, whether it was on one side or the other of the channel. Her possession, as of right, is thus a strong proof that her title was prior to that which would have accrued to her by the devestiture

New Jersey never had islands in the circle.

of the right of the crown, and the leaving of the river vacant between two States. New Jersey had no island within the twelve miles circle. JANUARY 1848.

A passage in Smith's History of New Jersey, it was thought, disclosed some right of New Jersey to an island there called Stuypson's island. The author, in giving an account of a negotiation with the Indians, says: "Also Stuypson's island, near Delaware river. Tom Store claims thirty acres," &c. The island was not found upon the map during the investigation, being searched for in the river, though Smith's language, "near Delaware river," indicated that the distance was not from the land into the river, but from the river into the land. A close examination since, has shown that it is what may be called an "inland island," formed by small streams, with, perhaps, the river on one side, but above the low water mark, and within the outline of the land, as "Bombay Hook," is on the other. It is far below the twelve miles circle, and is undoubtedly a part of New Jersey, by her original right; but not an island in the river or bay.

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Stuypson's is outside.

Something was also said about Egg island, but no evidence given. From the map it appears to be a very small island, low down in the bay, out of the circle, lying near the main land of New Jersey. Whether it is separated from the main, or adjoins it, by whom it is held, if by any body, and under what tenure, there is no proof in the case. New Jersey, or those claiming under her, had no island within the twelve miles.

Also Egg island.

Has New Jersey ever acquired the island from Delaware.

As to the Pea Patch island, New Jersey had at no

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time possession, and cannot be said to have set up a right to it. The contrary is quite clear. The right asserted was that of the West New Jersey proprietaries, which, as has been seen, was adverse to the State, and could not in any way enure to her use. So of the right of Dr. Gale and those deriving from him. And when, at last, it came to be doubted whether the proprietaries had any right at all, and when the United States were in actual possession, and New Jersey was asked for an act, that act did not assert any title, but only released her right and interest, whatever it might be. Delaware, on the other hand, was in possession, as far as a State could be. There is satisfactory evidence as to one individual residing on the island after the United States entered upon it; that he was assessed and voted in Red Lion Hundred.

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New Jersey never has had possession of Pea Patch.

Nor asserted title to it.

Has New Jersey ever acquired the island from Delaware?

So much for the islands. Now as to the jurisdiction. There is no evidence to establish a single instance of its exercise by New Jersey over that part of the river and islands, and there is no reason to believe that there was one. One witness was called, to show that process from New Jersey had been once served upon the Pea Patch island, in recent times; but it failed entirely. There was no process; there was no arrest, and all that was made out was that a constable from Salem county came with a pistol, and went away without a prisoner. The ejectment in the Circuit Court of the United States for the New Jersey District, is of no weight. It was brought by an individual, of his own authority; it was after this controversy had begun, and for the purpose of determining this controversy.

No evidence of exercise of jurisdiction by New Jersey over the river in the circle.

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On the part of Delaware, the evidence is full and complete of the exercise of jurisdiction over that part of the river and islands, as far back as evidence can be expected to go. The process of her courts, and of the courts of the United States sitting in that district, for the arrest of persons and property afloat, has been issued and executed, and continues so to be, quite over to the low water mark on the Jersey side; and this, not occasionally, but habitually, without doubt or question, as a matter of course, whenever applied for. Such arrests have been made of persons and property escaping from above. The cases have been contested upon every ground that ingenuity could suggest, or the zeal of parties prompt; but there never has been an instance of any one disputing the jurisdiction in the courts either of the State or of the Union. This must be admitted to be very persuasive evidence. In the absence of proof to the contrary, it must be deemed conclusive.

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Clear evidence of exercise of jurisdiction by Delaware over the circle.

Now, this evidence comes from numerous witnesses, of great intelligence and unquestionable credit, well informed upon the subject they speak of, by their pursuits in life, and it coincides (for it did not require support or corroboration) with the proof of particular instances, both by parol and exemplifications of records here produced. The exhibition of the evidence at large, or even a considerable part of it, would be tedious and unnecessary. The whole was carefully reduced to writing, and will be preserved.*

*NOTE BY THE REPORTER: This, with the other evidence and proceedings in the case, all which were recorded by the Secretary of the Reference, was transmitted by the Arbitrator, after making his award, to the office of the Solicitor of the Treasury of the United States. A call was subsequently made by the Senate for these papers. Having been transmitted to that body and read there, they were ordered to be printed, and will be found among the Senate Documents (Executive, No. 21,) of the first session of the 30th Congress.

JANUARY 1848. But it is quite impossible to look at the list of witnesses without feeling unbounded confidence that, from their own experience, and from the traditions and other sources of information of the past, which lawyers and judges are obliged to explore, and to follow as their guide, we have the whole knowledge of what has been held and done from an early, perhaps the earliest, period, concentrated and condensed in this body of testimony. With nothing to contradict it, (and there is nothing,) one might safely say, such has always been the law of Delaware. Kensey Johns, Esq. for example, above eighty-eight years of age, states "that he has resided in New Castle since 1780, now sixty-seven years. He was a practising lawyer for twelve years, afterwards Chief Justice of the Supreme Court for thirty-eight years, afterwards Chancellor of the State, since that time, and at present, living a private gentleman." Any one else, speaking of him, would add, and during the whole of this lengthened period, exercising a most wholesome influence by example and precept, upon the minds and morals of the community he lived in. He says "it has always been considered and held by the courts, publick officers and lawyers of Delaware, as far as my memory reaches, that the title and jurisdiction of the State of Delaware, extended to a circle of twelve miles around New Castle, to low water mark on the New Jersey shore. I have never heard the title and jurisdiction of the State of Delaware, over that part of the river Delaware, doubted by any court, publick officer or lawyer in Delaware, on any occasion whatever. Within my knowledge and remembrance, writs have been often issued out of the

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Clear evidence of exercise of jurisdiction by Delaware over the circle.

courts of Delaware, to seize vessels and persons in all parts of the river Delaware, within the circle to low water mark on the New Jersey shore, and no dispute, question, or plea was ever made or suggested, within my memory, before any court in Delaware, against the title of Delaware over all such parts." And, again, "the State of Delaware, for the whole period of my remembrance, and as far back as my researches extend, has claimed and exercised jurisdiction over the Delaware river and soil thereof, within the circle, to low water mark on the Jersey shore, and the State has never failed to exercise this jurisdiction when called upon or asked to do so." Eleven other witnesses, eminent citizens of Delaware, with large means of knowledge, whose names, if repeated, would command respect for their testimony, make similar statements, and some of them give an account of particular cases of arrest and seizure, known to them personally. John Steele, also, a citizen of Pennsylvania, gives an account of his following a vessel down the river, getting process against her from a court in Delaware, and having it executed far over on the east side of the river.

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Clear evidence of exercise of jurisdiction by Delaware over the circle.

New Jersey, as before stated, never objected to the claim of Delaware, nor, as far as appears, set up any claim of her own. In 1709 the boundaries of counties were fixed by an act of the Legislature. Those on the Delaware were bounded on the west by the river, the lines running along the river shore, and not into the river. In 1822, it is true, an act was passed to extend one or more of the lower counties into the river. But this was after the United States had obtained the cession from Dela-

JANUARY 1848. ware, was in actual possession, and this controversy had begun. Besides, of what avail is such an act of the Legislature, except as some evidence (under the circumstances just mentioned, very feeble, indeed) of a belief of right, and keeping up of a claim over her own territory. A constitutional act of a State Legislature, touching any part of such territory, is undoubtedly potent, and is notice to all the world; but as to territory of another State, it is inoperative, and it is notice to nobody. This act, therefore, is of no effect.

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Upon all the grounds thus reviewed, the conclusion is, that the title to the Pea Patch island was in the State of Delaware. On May 27th 1813, that State, by an act of her Legislature, ceded it to the United States upon conditions having regard to the publick benefit, and not for any selfish interest of her own. No doubt can be entertained that New Jersey would, in the like case, have done as her sister Delaware did, had she been free to do so. But a private claim had intervened, which she had no rightful power to dispose of; and, if it has so happened that, after a long and costly litigation, that claim has proved to be unfounded, it is to be regretted that the claimant should have been put to useless expense and trouble; but this feeling can have no influence in determining the question of right.

Conclusion.

By the cession of Delaware the title passed to the United States. The award, therefore, must be, and is, that the title is in the United States.

Award.

Under and by virtue of the foregoing agreement and submission, having heard the parties by their counsel, their proofs and allegations, and duly and deliberately considered the whole matter, and weighed the evidence and arguments on both sides, I do hereby award that the title to the Pea Patch island is in the United States.

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In witness whereof, I have hereunto set my hand and seal, this fifteenth day of January, in the year of our Lord one thousand eight hundred and forty-eight, at the City of Washington.

JOHN SERGEANT. [SEAL.]

Witness:

JOHN WM. WALLACE, (*Secretary of the Reference.*)
JOHN M. CLAYTON, (*Senator from Delaware.*)
WILLIAM L. DAYTON, (*Senator from New Jersey.*)

[FINIS.]

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An appellee in Admiralty may amend in *this* court the libel he has filed in the District Court, so as to make a claim here for damages above costs, caused by a vexatious appeal. *Weaver* v. *Thomson* 343

AVERAGE.

A removal in a port of necessity, for the purpose of repairs of perishable fruit, which increased an incipient decay, and precipitated an entire loss of the fruit, is not a matter for general average. *Bond* v. *The Superb* 355

AMENDMENTS. Page.

An appellee in Admiralty may amend in this court, the libel he had filed in the court below, so as to make a claim here for damages, above costs, caused by a vexatious appeal. *Weaver* v. *Thompson*..... 343

APPEALS FROM THE ADMIRALTY.

1. When an Admiralty case comes into this court on an appeal from the District Court, either side—by the practice of the third Circuit—is at liberty to take new evidence. But generally speaking, where the decree of the District Court is reversed, because it was given on a different state of facts from that presented to this court, the party succeeding here does not have costs. *Carrigan* v. *The Charles Pittman*..... 307

2. An appellee in Admiralty may amend in *this* court the libel he has filed in the District Court, so as to make a claim here for damages above costs, caused by a vexatious appeal. *Weaver* v. *Thompson*..... 343

AUDITORS' FEES.

The compensation of Auditors is regulated not only by the labour which they have, but also by the amount of money to be distributed. *Lombard* v. *Bayard*..... 196

BOUNDARY.

The territory of the State of Delaware within the twelve miles circle, extends across the Delaware river, to low water mark on the Jersey shore. *The Pea Patch Island case.* Appendix..... x

CASES OVERRULED, DENIED OR DOUBTED.

1. *Bannert* v. *Day*, (3 Washington's Circ. Ct. Rep. p 243) doubted *in the matter of Hall's Depositions*, p. 85, 88, &c.
2. *Blight's Executor* v. *Fiske & Ashley*, (Peters' Circuit Court Reports, 41) overruled in *Parker* v. *Hotchkiss*, p. 269, &c.
3. *Boston Manufacturing Company* v. *Fisher*, (2 Mason 119) denied in *Simpson* v. *The Rail Roads*, p. 164, 166, 271, &c.
4. *Boudereau* v. *Montgomery*, (4 Washington's Cir. Ct. Rep. 186) doubted *in the matter of Hall's Depositions*, p. 85, 88, &c.
5. *Certain Logs of Mahogany*, (2 Sumner, 589) denied as to part of the argument in it, in *Taylor* v. *The Royal Saxon*, p. 310, 335.
6. *De Lovio* v. *Boit*, (2 Gallison, 398) doubted in *Taylor* v. *The Royal Saxon*, p. 310, 323
7. *Geyer's Lessee* v. *Irwin*, (4 Dallas, 107) denied in *Nones* v. *Edsall*, M. C. p. 189, 191
8. *United States* v. *Cushman*, (2 Sumner, 426) denied in *United States* v *Archer's Executors*, 173, 183, &c.
9. *United States* v. *Gilbert*, (2 Sumner, 19) denied in *United States* v. *Harding*, 127, 142

CAPTAIN'S WAGES.

A sea captain having been employed on ship board in an Eastern country in a service not strictly within his ordinary office, and not originally, in any way contemplated, was regarded as not being a mere agent of the ship-owner; and was accordingly allowed to receive compensation on his own account, from the parties with whom he dealt; the compensation, though large, appearing to be *somewhat in the nature of a present*. *Wilcox* v. *Phillips' Executors*..... 47

CHALLENGES.

No Peremptory Challenges are allowed in this Court to either side where the jury has been already struck on both sides. *Blanchard* v. *Brown*..... 309

CONFLICT OF JURISDICTION.

The pendency of a replevin in a State court to settle the right of property in a vessel,

is a bar to a libel in the Admiralty to settle the same right between the same persons; not technically a bar as a plea of *lis pendens*, but effectively so, to prevent a conflict of jurisdiction. *Taylor* v. *The Royal Saxon* ..... Page 311

CONTEMPT OF COURT.

Although this court is deprived by the act of March 2, 1831, of power to punish as for *contempt*, the publication, during trial, of testimony in a case, yet having power to regulate the admission of persons, and the character of proceedings within its own bar, it can exclude from it any person coming there to report testimony during the trial. *United States* v. *Holmes*..... 1

CONTINUANCE,

Attendance upon Congress, as a member of that body, does not confer such "privilege," as to entitle a party to have a postponement of his suit as *a matter of right*; though the court may grant a postponement under particular circumstances (—and did grant it in this case—) in its discretion, and upon terms. The dictum in Geyer's Lessee v. Irwin, 4th Dallas 107, is not law. *Nones* v. *Edsall, M. C.*..... 189

CORPORATION.

A religious corporation, created under the act of April 6th, 1781, of the Pennsylvania Legislature, can be a trustee for the heir at law of the testator, who devised certain lands to it in trust for uses that were void. The statute of mortmain, 9 Geo. II. chap. 39, has never been in force in Pennsylvania. Dictum that none of the English statutes of mortmain ever will. *Miller* v. *Lerch*..... 210

A corporation is private, as distinguished from publick, unless the whole interest belongs to the government, or the corporation is created for the administration of political or municipal power. *Rundle* v. *The Delaware and Raritan Canal*..... 275

COSTS CONNECTED WITH JURISDICTION.

Where a libel is dismissed for want of jurisdiction apparent on its face, costs of suit be awarded to either party, though the *costs of the motion to dismiss* may be to the party which succeeds. But where on the face of the libel the court has jurisdiction, and the want of it though really existing, is disclosed only by the defendant's answer, and the evidence taken in the case, *costs of suit* may be awarded to the party who succeeds. *Lowe* v. *The Canal Boat Benjamin*..... 187

DAMAGES.

A jury cannot allow the plaintiff in a patent case, as part of his actual damages, any expenditure for counsel fees or other charges, even though necessarily incurred to vindicate the rights given him by his patent, and though not taxable costs. *Stimpson* v. *The Rail Roads*..... 164

DELAWARE.

The territory of the State of Delaware within "the twelve miles circle," extends across the Delaware river to low water mark on the Jersey shore. *The Pea Patch Island Case.* Appendix..... x

DOMESTICK VESSEL.

For the purpose of enforcing a lien given by a State law against domestick vessels, and where the national character is not in dispute; the person rightfully in possession, navigating the vessel for his own use and profit, by officers and mariners appointed and employed by himself, will be considered the owner, whether he be lessee, mortgagee or parol vendee, notwithstanding some other person may be the registered owner and have the legal title and general ownership in himself. *Weaver* v. *The S. G. Owens*..... 359

DOMICIL.

Domicil of origin is not lost, for purposes of succession, by very long residence abroad,

and *mere doubt*, even very strong doubt *of* a *real* intention to return. *White* v. *Brown*..... Page. 217

EQUITABLE RELIEF.

Where a party whose obligation to pay arises from his contract only—as a surety—is discharged at law, equity will not extend his liability in a case where there has been neither fraud nor accident. And this although, in its terms the contract is several as well as joint. *The United States* v. *Archer's executors*..... 173

EVIDENCE.

1. A paid legatee is a competent witness where payment has been made by the executor, voluntarily, with knowledge of the claim sued upon, and without a refunding bond, and a long time has elapsed since the death of the testator. The length of time is regulated by analogy to the statute of limitations. *Wilcox* v. *Phillips' Executor*..... 47

2. Although parol evidence may be received of the law of a peculiar and isolated country, like China, yet it will be received only where it is clear and free from any ambiguity..... ib.

3. In the absence of more direct evidence, tradition is an authoritative means of ascertaining ancient opinion and fact. *Fisher* v. *Carter*..... 69

4. Presumption of death does not arise from the fact that a person who, twenty-two years ago was in "bad health," would, if now living, be eighty years old; not even although on recent inquiry, his name was not known at the post office of a large city, (his former residence,) nor inserted in its directory:—There being no evidence of the sort nor degree of bad health, nor of inquiries having been made about him among his friends, nor of his having ever left the place of his former residence. *In the matter of Hall's Deposition*..... 85

5. Where a statute, dispensing with common law proof of a writing, allows a certified copy to be evidence after certain acts previously performed in regard to the original, a copy certified so as not to shew that those acts have been previously performed, is inadmissible. *The United States v. Robinson et al.*..... 161

6. The 15th section of the act of Congress of July 4, 1836, commonly called the Patent act, does not require notice of the names and places of residence of the witnesses, by whom it is intended to prove a prior knowledge and use of the thing patented. *Wilton* v. *The Rail Roads*..... 192

7. Where several persons, all of whom testify to considerable acquaintance with a family, swear that a particular person's pedigree was matter of common reputation, (notoriété publique,) it will be inferred that reputation in the family is meant to be included; although not so in any way said: This, at least, in favour of depositions taken abroad; when the opposite party has not chosen to cross-examine, nor offered counter evidence; and when the depositions present general evidence of candour. The circumstances last mentioned are considerations which may properly weigh with the court, and induce the admission of testimony which, in opposite circumstances, might give pause. *Dussert* v. *Roe*..... 39

8. The contents of affidavits made *ex parte* several years before to prove pedigree, are admissible as heresay, even though what was said was in answer to inquiries made by a person interested to obtain a particular answer; the affidavits having been made apparently in compliance with official requirement, and there being no evidence of any actual controversy on the subject. *Hurst* v. *Jones*. Appendix. iii

FEIGNED ISSUE.

Where a feigned issue for trial of a fact is directed by the court, no declaration of any sort is requisite. The case is put on the trial list and the jury sworn to try the issue, in the words of the order of issue itself. *Wilson* v. *Barnum*..... 342

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FRAUDULENT CONVEYANCE.

A voluntary settlement in favour of an illegitimate child by a father in trade, and indebted, if clearly solvent at the time, is good against subsequent creditors; the settlement having been made without a fraudulent intent. *Anonymous* 107

GUARANTY.

The word "guaranty," is somewhat technical and limited in its signification in Pennsylvania; and where it is employed, the creditor must enforce his remedies against the principal debtor before he resorts to the guarantor; or else he must show that the affairs of such principal debtor were in such a condition, that any pursuit of him would have proved fruitless. This at least, unless the agreement of guaranty is in some way qualified, so as to control this the obligation which, when the word "guaranty" is used, it commonly imposes. *Parker* v. *Culvertson* 149

HOMICIDE.

Seamen have no right, even in cases of extreme peril to their own lives, to sacrifice the lives of passengers to preserve their own. On the contrary: being common carriers, and so paid to protect and carry the passengers, the seamen, beyond the number necessary to navigate the boat, can in no circumstances claim exemption from the common lot of passengers. *United States* v. *Holmes* 1

INDICTMENT.

The indictment charged that the prisoner did commit manslaughter on the high seas. 1st. By casting F. A. from a vessel belonging, &c. whose name was unknown. 2d. By casting him from the long-boat of the ship W. B. belonging, &c. The indictment is sufficiently certain. *United States* v. *Holmes* 1

Where two or more defendants are jointly charged in the same indictment with murder, it is competent for the jury to find one guilty of murder and another of manslaughter, and on such a verdict being rendered, it will not be disturbed by the Court as irregular. *United States* v. *Harding* 127

INJUNCTION.

1. By the practice of the Third Circuit, no money penalty is inserted in an injunction. *Low* v. *Hauel* 345

2. The grant of a patent at the Patent Office, is not of itself, or in virtue of § 7 of the act of July 4th, 1836, a bar to an interlocutory injunction in favour of a person claiming to be a prior patentee of the same thing; such person not having received notice at the Patent Office to appear and be heard, and the court on a hearing before it, being well satisfied that the last patent is an interference with the one granted before. *Wilson* v. *Barnum* 347

3. The District Judge sitting for the Circuit Court, and being himself well satisfied of an infringement—although, of numerous experts examined, a majority thought differently from him on that point—may grant an interlocutory injunction to restrain the use of a patented machine as an infringement of a prior one; the machine last patented not having been granted after notice from the Patent Office to the complainant, to appear and be heard ..... ib.

4. Where the District Judge, sitting for the Circuit Court, and being satisfied of an infringement, had granted an interlocutory injunction till trial, to restrain the use of a machine, and the President Judge, after hearing the evidence before the jury on the trial, differed from his brother, who after hearing the same evidence still

retained his former opinion, and the jury could find no verdict; the full court, in its subsequent action on the injunction, need not consider itself either as bound or as unable to dissolve it: but the action upon it may be modified; the modification being largely regulated by what probably would have been the original action of a full court. ..... Page. 347

ISLANDS.

At no time in the history of Pennsylvania, neither before October 13th, 1760, nor since, have islands in her larger rivers been open to settlement on the same terms with fast land generally. They could be settled only on *agreed* terms. *Fisher* v. *Carter*..... 69

The Pea Patch Island situated in the Delaware, is within the territory of the State of Delaware. *Case of the Pea Patch Island.* Appendix..... ix

JUDGMENT.

1. The lien of a judgment in the Circuit Court of the United States is co-extensive with the district, and is not confined to the county of Philadelphia merely. *Lombard* v. *Bayard*..... 135

JURISDICTION OF THE ADMIRALTY.

1. Where the larger portion of a voyage is upon tide-water, the jurisdiction of the admiralty is not ousted by the fact that the residue (the terminations, each way, of the voyage) is upon water of a different character; as, for example, on a canal. *The Robert Morris*..... 33

2. The admiralty may maintain petitory as well as possessory suits in regard to vessels, that is to say, it may maintain in questions concerning the titles of vessels as well as in questions relating to their possession simply. (So said though not adjudged.) *Taylor* v *The Royal Saxon*..... 311

3. A sale of a vessel by order of a court of Pennsylvania, under the Foreign Attachment law of that State, does not divest a lien in the admiralty for seamen's wages filed before the order of sale. (So said though not adjudged.) ..... ib.

4. The pendency of a replevin in a State court to settle the right of property in a vessel, is a bar to a libel in the admiralty to settle the same right between the same persons; not technically a bar as a plea of *lis pendens*, but effectively so, to prevent a conflict of jurisdiction..... ib.

5. The District Court of the United States has power to enforce the lien on domestick vessels, under the Pennsylvania statute of June 13, 1836, which though providing almost entirely for a process of inforcement through the State courts, does not yet exclude, but in one section, contemplates the action of the Federal courts. *Weaver* v. *The S. G. Owens*..... 359

JURISDICTION OF THE CIRCUIT COURT.

A Pennsylvania plaintiff may sustain an action in this court, in New Jersey against a corporation chartered by the latter State for consequential injuries done to the plaintiff's real property lying in Pennsylvania, the cause of the injury, a canal, being in New Jersey. *Rundle* v. *The Delaware & Raritan Canal*..... 275

JURORS' FEES.

Jurors living at a distance, and not receiving mileage at adjournments, are entitled to a per diem for those days during which the jury stands adjourned, as well as for those to which it stands adjourned, on which the jurors appear and answer to their names. *Parker* v. *Kempton*..... 344

LICENCE AS DISTINGUISHED FROM GRANT.

A proviso in one of the joint acts of the Pennsylvania and New Jersey Legislatures, declaring the Delaware river a common highway, and authorizing the improvement of it by commissioners, provided that no power given by the act should give power

"to remove, throw down, lower or impair, or in any manner to alter" certain mi l Page.
dams, nor to obstruct or "in any manner hinder" the owners of them or "their heirs and assigns, ... from taking water out of the said river for the use of the said mills," is not a grant of the water, but the toleration of a nuisance, and a mere license, revocable at pleasure, to use the water. *Rundle* v. *The Delaware & Raritan Canal*. 275

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2. No lien exists in the admiralty for services performed by a stevedore in loading and storing the ship's cargo. *M'Dermott* v. *The S. G. Owens*. 370

LIEN OF JUDGMENT.

The lien of a judgment in the Circuit Court of the United States, is co-extensive with the district, and is not confined to the county of Philadelphia merely. *Lombard* v. *Bayard*. 197

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A Pennsylvania plaintiff may sustain an action in this court in New Jersey against a corporation chartered by the latter State, for consequential injuries done to the plaintiff's real property lying in Pennsylvania, the cause of the injury—a canal—being in New Jersey. *Rundle* v. *The Delaware & Raritan Canal* 275

MORTMAIN, STATUTES OF.

A religious corporation, created under the act of April 6th, 1781, of the Pennsylvania Legislature, can be a trustee for the heir at law of the testator, who devised certain lands to it in trust for uses that were void. The statute of mortmain, 9th Geo II. chap 39, has never been in force in Pennsylvania. *Dictum*, that none of the English statutes of mortmain ever were. *Miller v. Lerch*. 210

MURDER.

Where two or more defendants are jointly charged in the same indictment with murder, it is competent for the jury to find one guilty of murder and another of manslaughter, and on such a verdict being rendered, it will not be disturbed by the court as irregular. *The United States* v. *Harding*. 127

NEW TRIAL.

1. After a conviction in the United States of a capital offence, it is in the discretion of the court to grant a new trial on the application of the prisoner; it being competent for the prisoner himself, by such application, to wave the benefit of that clause in the constitution which provides that no man shall be put twice in jeopardy of life or limb for the same offence. *United States* v *Harding*. ..... ib.

2. Where a jury in a patent case, under a direction from the court, conceded afterwards to be erroneous, allowed a plaintiff, in a verdict for damages, money paid for counsel fees, their verdict was sustained by way of an exception; the misdirection of the court not having been assigned as a reason for new trial, the expenditures having been proved to be paid, and the verdict having attained, though improperly, the same result nearly, that the court in its power to treble the damages might have reached in a regular way. *Stimpson* v. *The Rail Roads* 164

3. Where a jury has had a case before it and disagreed, a second trial cannot be had by another jury from the residue of the panel. The case must go over until the next term, in order that it may be tried by a new venire. *Wilson* v. *Barnum*. 347

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OPINION OF COUNSEL.

The opinion of counsel not in practice, and given in a case other than that before the court, may, in the court's discretion, be quoted at the bar; not as authority, in a technical sense, but as calculated to assist the court in its researches and judgment. *Annonymous*..... 107

PATENT CASES.

1. The 15th section of the act of Congress of July 4 ,1836, commonly called the Patent Act, does not require notice of the names and places of residence of the witnesses, by whom it is intended to prove a prior knowledge and use of the thing patented, *Wilton* v. *The Rail Roads*..... 192

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3. Where a transfer of certain specified privileges, *part* of larger privileges secured by patent right, does not confer a legal title to the whole, or to an *undivided* portion of the right, nor grant the *entire* or exclusive right within a specified part of the United States, a suit for an infringement of one of the privileges transferred, is properly brought at law, in the name of the original holder. For example: B. having a patent for turning irregular forms *generally*, grants to C. the full and exclusive license, right and permission, to use it for turning *shoe lasts*. D. having infringed the patent by turning shoe lasts, it was held that suit for the infringement was properly brought at law in B's. name. *Blanchard* v. *Eldridge*..... 337

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2. The question whether declarations *post litem motam* are evidence in matters of pedigree, largely examined, and declared not to be, though not so adjudged, the case being rested on another ground. *In the matter of Hall's Deposition*. 85

3. The contents of affidavits made ex-parte several years before to prove pedigree, are admissible as hearsay, even though what was said was in answer to inquiries made by a person interested to obtain a particular answer; the affidavits having been made apparently in compliance with official requirement, and there being no evidence of any actual controversy on the subject. *Hurst* v. *Jones*. Appendix. iii

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1. The indictment charged that the prisoner did commit manslaughter on the high seas. 1st, by casting F A. from a vessel belonging, &c whose name was unknown. 2d, by casting him from the long-boat of the ship W. B. belonging, &c. The indictment is sufficiently certain. *United States* v. *Holmes*..... 1

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2. A suitor in this court residing without the circuit, is privileged from the service of a summons. The case of Blight's Executor v. Fisher & Ashley, decided by Judge Washington, A. D. 1809, in which this privilege was limited to exemption from arrest, is here over-ruled. *Parker* v. *Hotchkiss*..... 269

3. A defendant will not be allowed as a matter of course, to put in new pleas in this court as in State courts on the trial of a case. The court speaks of the practice of so doing as vexatious, and one which will be allowed only where a good reason is shewn for it, and then generally speaking only upon terms. *Childs* v. *Lenig*. 305

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1. Attendance upon Congress as a member of that body, does not confer such privilege, as to entitle a party to have a postponement of his suit as a matter of right; though the court may grant a postponement under particular circumstances (—and did grant it in this case,—) in its discretion, and upon terms. The dictum in *Geyer's Lessee* v *Irwin*, 4th Dallas, 107, is not law. *Nones* v. *Edsall, M. C.* 189

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Although the court is deprived by the act of March 2, 1831, of power to punish as for a contempt, the publication, during trial, of testimony in a case; yet having power to regulate the admission of persons, and the character of proceedings within its own bar, it can exclude from it any person coming there to report testimony during the trial. *The United States* v. *Holmes*. 1

QUOTATION OF AUTHORITIES.

Page.

The opinion of counsel not in practice, and given in a case other than that before the court, may, in the court's discretion, be quoted at the bar; not as authority, in a technical sense, but as calculated to assist the court in its researches and judgment. *Anonymous*..... 107

SEAMEN'S WAGES.

A sale of a vessel by order of a court of Pennsylvania under the Foreign Attachment law of that State, does not divest a lien in the admiralty for seamen's wages filed prior to the *order of sale* (So said though not adjudged.) *Taylor* v. *The Royal Saxon*, 311

SELF DEFENCE.

Seamen have no right, even in cases of extreme peril to their own lives, to sacrifice the lives of passengers to preserve their own. On the contrary: being common carierrs, and so paid to protect and carry the pasengers, the seamen, beyond the number necessary to navigate the boat, can, in no circumstances claim exemption from the common lot of passengers. *United States v. Holmes* 1

SENTENCE.

Where the judges who compose a court have all been commissioned subsequently to a verdict taken by a former court, of murder as to one defendant and manslaughter as to others; which former court became vacant by the death of all its judges pending a motion for a new trial in the case, on the ground that the verdict was against evidence and against law; the new court will not award sentence on the verdict as to defendants who ask for a new trial; nor will that court hear evidence as to what opinion on the motion for a new trial, the former court had formed; the same having been confidentially expressed to an officer of the court, and not yet made known from the bench. *United States* v. *Harding et. al.* 127

SERVICE OF WRIT.

A suitor in this court, residing without the circuit, is privileged from the service of a summons. The case of *Blight's Executor* v. *Fisher & Ashley*, decided by Judge Washington, A. D. 1809, in which this privilege was limited to exemption from arrest is here overruled. *Parker* v. *Hotchkiss* 269

SHIP.

For the purposes of enforcing a lien given by a State law against domestick vessels, and where the national character is not in dispute; the person rightfully in possession, navigating the vessel for his own use and profit, by officers and mariners appointed and employed by himself, will be considered the owner, whether he be lessee, mortgagee, or parol vendee, notwithstanding some other person may be the regi-tered owner and have the legal litle or general ownership in himself. *Weaver* v. *The S. G. Owens*..... 359

SHIP CHANDLERY

"Ship Chandlery, is a term of extensive import, and includes every thing necessary to furnish and equip a vessel, so as to render her seaworthy for the intended voyage. Accordingly not only stores, stoves, hardware and crockery, were held to be within the term, but muskets and other arms also:—the voyage being round Cape Horn to California. in the course of which voyage, arms are sometimes carried for safety. *Weaver* v. *The S. G. Owens* 359

SHIP OWNER.

A sea captain having been employed on ship board in an Eastern country in a service not strictly within his ordinary office, and not originally, in any way contemplated, was regarded as not being a mere agent of the ship-owner; and was accordingly allowed to receive compensation on his own account, from the parties with whom he dealt; the compensation, though large, appearing to be *somewhat in the nature of a present*. *Wilcox* v. *Phillips' Executors*..... 47

STATUTORY PROOFS. Page.

Where a statute, dispensing with common law proof of a writing, allows a certified copy to be evidence after certain acts previously performed in regard to the original, a copy certified so as not to shew that those acts have been previously performed, is inadmissible. *United States* v. *Robinson et al.* 161

STEVEDORE.

No lien exists in the Admiralty for services performed by a stevedore in loading and storing the ship's cargo. *M'Dermott* v. *The S. G. Owens*..... 370

SURETY.

Where a party whose obligation to pay arises from his contract only—as a surety—is discharged at law, equity will not extend his liability in a case where there has been neither fraud nor accident. And this although, in its terms the contract is several as well as joint. *United States* v. *Archer's Executors*. 173

TRADITION.

In the absence of more direct evidence, tradition is an authoritative means of ascertaining ancient opinions and facts. *Fisher* v. *Carter*..... 69

TRUSTEE.

A religious corporation, created under the act of April 6th, 1781, of the Pennsylvania Legislature, can be a trustee for the heir at law, of the testator who devised certain lands to it in trust for uses that were void The statute of mortmain, 9 Geo II. chap. 39, has never been in force in Pennsylvania. *Dictum* that none of the statutes of mortmain ever were. *Miller* v. *Lerch*..... 210

VOLUNTARY SETTLEMENT.

A voluntary settlement in favour of an illegitimate child by a father in trade, and indebted, if clearly solvent at the time, is good against subsequent creditors; the settlement having been made without a fraudulent intent. *Anonymous*..... 107

Errata.

United States v. Holmes, p. 29, 10th line from top. For *subsequently shewed cause*, read *in favour of a new trial.*

Fisher v. Carter, p. 69. The Reporter is informed that there were points both of fact and law in this case, (the report of which is derived from notes taken by another,) besides the one here reported. These points, however, were entirely disconnected with the point here raised, which was argued and decided upon its own merits alone.

Stimpson v. The Rail Roads, p. 172, 9th line from top. For "*be objected to if.*" read "*if objected to be*"

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